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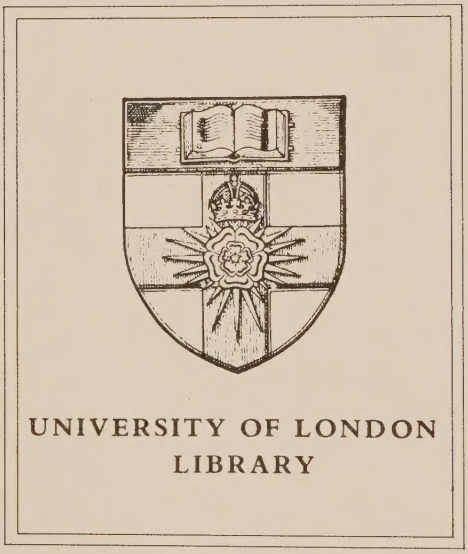

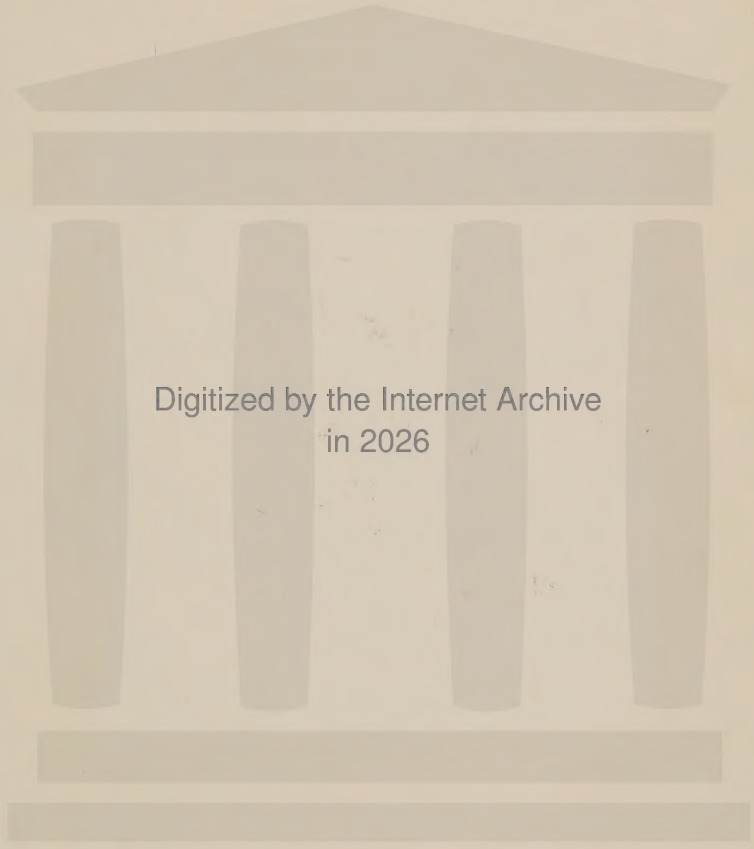

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

DUNCAN, FOX, & CO., AND ROBINSON & CO. APPELLANTS;

AND

THE NORTH AND SOUTH WALES BANK, S. C. RADFORD, RADFORD & SONS, AND BALFOUR, WILLIAMSON, & CO. . . } RESPONDENTS.

H. L. (E.)
1880
July 22, 23, 26, 27; *Nov.* 27.

Bill of Exchange—Indorser—Surety—Securities.

The acceptor of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor.

He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of those securities.

The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship.

S. C. R., one of the partners of *S. R. & Sons*, in December, 1874, deposited with the *N. & S. W. Bank* the title deeds of two of his own freehold pro-

H. L. (E.)

1880

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perties, and signed a memorandum acknowledging them to be deposited as securities for what the *N. & S. W. Bank* might advance to the firm in the way of discounts.

In November, 1875, *D. & Co.* sold to *R. & Sons* a cargo of corn to be paid for in cash. Cash was paid only for part. *R. & Sons* offered a bill of exchange for the rest, which was declined. *D. & Co.* were customers of the *N. & S. W. Bank*. *R. & Sons* said if *D. & Co.* would inquire of those bankers they would find it would be all right with the *R.* bills. The bank manager refused to discount the bill without the indorsement of *D. & Co.*, but said that he believed *D. & Co.* would incur no more than a nominal liability by putting their names on the bill. *D. & Co.* thereupon consented to take the bill, indorsed it in the ordinary way, and it was discounted by the bank and carried to their credit. In January, 1876, *R. & Sons* stopped payment. The bill became due in February, and was dishonoured. *D. & Co.*, who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on *R. & Sons'* bills, brought an action against the *N. & S. W. Bank* to have the benefit, so far as they would go, of the securities deposited in December, 1874, claiming to be sureties to the bankers for what was due upon the bill :—

Held, that *D. & Co.* were sureties on the bill, and that as such they were entitled to the benefit of these securities.

THE two firms of the Appellants carried on business at *Liverpool* as merchants. They were not connected together in business, but the transactions of both with the *Radfords* were exactly of the same kind. It will be sufficient to refer to one alone.

Radford & Sons were millers and corndealers at *Liverpool*, the firm consisting really of *Samuel Collins Radford* and *James Radford*.

The *Radfords* were not strictly the customers of the *North and South Wales Bank*, but had opened a discount account with it, and were indebted to it in respect of discounts of bills of exchange. This discount account was considerable.

On the 1st of December, 1874, *Samuel Collins Radford* deposited with the bank certain deeds of freehold property belonging to himself, for the purpose of securing payment of the amount then due, and to become due, on discounts, from his firm to the bank. The deposit was effected by two memorandums, one of which, executed by Mr. *S. Collins Radford* alone, stated that the deposit was made "in pledge to secure to the said bank the balance, for the time being, owing to the said bank by my firm of *Samuel Radford & Sons* for discounts and advances, and for all other moneys in or for which the said firm, whether alone, or jointly with

any other person or persons, were, or might, from time to time thereafter be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm." The second memorandum relating to other property of *S. C. Radford* was in a similar form.

In November, 1875, *Duncan & Co.*, through their brokers *Maxwell & Co.*, sold to *S. C. Radford & Co.* a cargo of wheat *ex Rima* for cash after delivery. Part of the price was paid in cash, but *James Radford* applied to Mr. *Duncan* to take the acceptances of *Radford & Sons* for the residue. *Duncan* at first declined to do so, on which *James Radford* said, "You bank with the *North & South Wales Bank*, if you go there you will find it will be all right with our bills," to which *Duncan* answered, "If the bank will accept those bills without our indorsement, then I can oblige you." Mr. *Duncan* went to the bank and saw the manager, who declined to discount the bills without the indorsement of *Duncan & Co.*, stating that it was contrary to all banking customs to discount bills for any one who did not indorse them; he added that he did not think that *Duncan & Co.* would incur more than a mere nominal responsibility by making the indorsement—or something to that effect. Mr. *Duncan* thereon informed *Radford* that he would consent to take the bills, which he did, and then indorsed them and handed them to the bankers, who discounted them, placing the amount to the credit of *Duncan & Co.* At that time *Duncan & Co.* had no knowledge that the bankers held any securities from *Radford.* In January, 1876, before any of the bills became due, *Radford & Sons* stopped payment. When the bills became due they were presented for payment; they were dishonoured, and *Duncan & Co.* became liable to the bankers for the amounts. They received formal notice of the dishonour, and a demand of payment. There were other bills of *Radford & Co.* held by the bankers under similar circumstances on which *Robinson & Co.* were indorsers, all of which became due between the 22nd of February and the 27th of March. On the 24th of February, 1876, *Radford & Co.* executed a deed of inspectorship. The bankers made the property deposited with them available for the purpose of covering their claims, and if the bills in question were not included in the general balance, that balance would be satis-

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fied, but if they were included in it, the bankers would still be creditors of *Radford & Co.* upon the bills. Messrs. *Duncan & Fox* admitted their liability on the bills; but (having in the meantime heard of the securities held by the bankers) contended that they were entitled, in calculating the amount due upon the bills, to the benefit of these securities, for that they, *Duncan & Fox*, being merely, as between themselves and the bankers, sureties on the bills, they were entitled to the indemnity afforded by the securities which the principals on the bills, *Radford & Co.*, had placed in the hands of the bankers.

The Appellants, after coming to a knowledge that the bankers held securities to cover discount and balances, applied to them to realize these securities and apply the proceeds in payment of the amounts due on the bills, or to render to the Appellants an account of what was due from *Radford & Sons*, and, on payment of the same by the Appellants, to transfer to them the securities for the same amount remaining in their hands. *Balfour, Williamson, & Co.*, and the other unsecured creditors, claimed to have the securities paid over to the inspectors for general distribution under the deed. The bankers declined of themselves to adopt either claim, and required the direction of a Court.

An action was thereupon brought by *Duncan & Co.* in the Chancery Court of the County Palatine of *Lancaster*, to determine this question. Messrs. *Balfour, Williamson, & Co.*, creditors of the *Radfords*, were joined as Defendants representing the creditors in general. The Vice-Chancellor (Mr. *Little*) on the 10th of May, 1878, decided in favour of the claim made by *Duncan & Co.* The decree, dated the 28th of May, 1878, declared that the Appellants were sureties for the payment by the *Radfords* of the balance due in respect of the bills held by the bankers, and that the equitable mortgages of the 1st of December, 1874, extended to such bills of exchange and to all other acceptances of the *Radfords* held by the bankers, whether discounted by the *Radfords* or for third parties, and relief was given to *Duncan & Co.* upon the principle that they were entitled to the benefit of the securities so deposited with the bankers. On appeal, this decree was ordered to be reversed and the action dismissed with costs (1). This appeal was then brought.

(1) 11 Ch. D. 88.

Mr. *E. E. Kay*, Q.C., and Mr. *W. F. Robinson*, Q.C. (Mr. *Ralph Neville* was with them), for the Appellants:—

The Appellants here bore the character of sureties to the bank for the payment of these bills, and, in that character, were liable on the bills: *Byles* on Bills (1); and were therefore entitled to any benefit from securities held by the bankers which would diminish the amount of the liability they had incurred. If the acceptors, who were the persons primarily liable, the real principals on the bills, failed to pay them, the Appellants made themselves liable as indorsers: *Suse* v. *Pompe* (2), that is, as sureties. If the indorsers discharged that liability they then became entitled to sue the acceptors—and, suing them, to take their property in execution. Part of that property would be the securities left in the hands of the bankers, who, if they received payment of the bills from the sureties, the indorsers, could have no right to retain, as against them, the securities which had been deposited to cover the debt of the acceptors which they had satisfied. The right of a surety to be indemnified out of the property of the principal was undoubted: *Byles* on Bills (3); and was not lessened by the fact that, as between the principal and the surety, the liability arose with relation to a bill of exchange. The deposit agreement under which the securities were given was collateral to the bills and could not affect the rights of the parties to those bills: *Byles* on Bills (4); it did not amount to giving time to the acceptor: *Pring* v. *Clarkson* (5), and therefore could not discharge the indorser, for the mere giving of additional security by the principal will not discharge a surety, though giving time to the principal on account of that security, without notice to the surety, will have that effect: *Overend & Gurney* v. *The Oriental Financial Corporation* (6).

In a transaction of this kind the security given on the bills would be strictly confined to the bills themselves, even in the hands of the bankers, and, the bills being satisfied, those who had

(1) 13th Ed. ch. xviii. 245.
(2) Byles on Bills, 13th Ed. 154; 30 L. J. (C.P.) 75; 8 C. B. (N. S.) 538.
(3) 13th Ed. 249–258.
(4) 13th Ed. 101; *Webb* v. *Salmon*, 13 Q. B. 886; 3 H. L. C. 510.
(5) 1 B. & C. 14.
(6) Law Rep. 7 H. L. 348.

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been liable upon them became entitled to the securities: *Latham* v. *The Chartered Bank of India* (1). In *Praed* v. *Gardiner* (2) *A.* lodged certain securities in the hands of *B.* his creditor; *A.* afterwards incurred a fresh debt with *B.*, for the payment of which *C.* became security. *A.* became bankrupt, and *B.* called on *C.* to pay the second debt. The securities being more than sufficient to pay the first debt, *C.* was held entitled to the benefit of the surplus in reduction of the second debt. The indorser, who, as to the holder of the bill is surety for its paymnet, has not only a right to the benefit of securities in the hands of the holder, but, if the holder is a debtor to the principal, has a right to the benefit of set-off in respect of such debt: *Bechervaise* v. *Lewis* (3). There the payee suing a person whom he knew to have joined in a promissory note merely as a surety, the latter pleaded a set-off of a sum due from the payee to the acceptor, and the plea was held good. The judgment of the Court was delivered by Mr. Justice *Willes*, who in the course of it stated (4): "A surety has a right as against the creditor, when he had paid the debt, to have for reimbursement the benefit of all the securities which the creditor holds against the principal. The surety has another right, namely, that as soon as his obligation to pay becomes absolute he has a right in equity to be exonerated by his principal." That case the more directly applies here, for here the bankers knew perfectly well that the Appellants only indorsed the bills as sureties. The same principle had already been declared by the Exchequer Chamber in the case of *Holmes* v. *Kidd* (5). That principle had been explained in *Younge* v. *Reynell* (6) to be derived from the obligation under which the principal debtor lay to indemnify the surety, and Vice-Chancellor *Wood* in *Newton* v. *Chorlton* (7), declared that the surety was not to have his position deteriorated by any arrangement between the principal debtor and the creditor. Though, therefore, the Appellants here knew nothing of the deposit of the securities at the time they became sureties on the bills, it was clear upon all the authorities that they were, in

(1) Law Rep. 17 Eq. 205.
(2) 2 Cox, 86.
(3) Law Rep. 7 C. P. 372.
(4) Law Rep. 7 C. P. at p. 377.
(5) 3 H. & N. 891.
(6) 9 Hare, 809.
(7) 10 Hare, 646.

equity, entitled to the benefit of those securities as an indemnity against the liability they had incurred.

Mr. *Benjamin*, Q.C., and Mr. *A. G. Marten*, Q.C. (Mr. *F. Thomson* was with them), for the Respondents:—

There had not been anything done here which could in any manner vest especial rights in the Appellants. They were altogether strangers to what had passed between *S. C. Radford* and the bankers, and the securities given by him were expressly made liable only to what his firm might owe to the bankers. The Appellants were the persons who brought these bills to the bankers, and who had, on their own account, and for their own benefit, obtained from the bankers the amount of the bills. They had therefore made themselves, so far as they and the bankers were concerned, principal debtors. Under no pretence did the circumstances here warrant them in assuming the character of sureties, nor could the ordinary rules applicable in the case of principal and surety be applied in this case. So to apply them would be disastrous to mercantile transactions. The Appellants knew nothing of the securities deposited by *S. C. Radford*, and had not made themselves liable because of those securities, or on account of any reliance placed on them. The Appellants had been told that it was probable their liability would be merely nominal, and they had chosen to incur the chance in order to obtain a present benefit. They had become liable to the bankers as principals on the bills, and were so liable at the moment when the *Radfords* stopped payment. At that time the only question as to the benefit to be obtained from the deposited securities was one which might arise between the bankers and the *Radfords*, but with no one else. When the bankers' claims were satisfied, the property given to them as security for their possible advances to the *Radfords*, ought to be returned to those who gave it. In that way it would become liable to the general creditors of the firm—and for the benefit of those creditors vested in the trustees appointed under the deed of inspection. As general creditors the Appellants might possibly claim to participate in the benefit of these securities, but only in that character, and could not specially claim the exclusive advantage of them, for they were not sureties

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but principal debtors on these bills, which had been discounted at their own request and for their own advantage. [LORD BLACKBURN:—Were they not sureties to this extent—that if the acceptors paid the bills they were free, but if the acceptors did not pay the bills, they undertook to do so.] They undertook to pay the bills because they received the amount for their own use, and were in that way principal debtors. Under the special circumstances of the case they could not be said to bear any other character. The cases therefore where no such special circumstances existed did not apply to the present. As to the case of *Praed* v. *Gardiner* (1), no argument could properly be deduced from it, for the decree there appeared only to be a marshalling of securities held by the creditors according to the different equities of the persons entitled to redeem them; there was no sufficient explanation of the case, and the grounds of the judgment were not stated.

This action was premature. The Appellants had not paid the bills, which were still held by the bankers, and on that ground could not maintain this action, for there was nothing to entitle them to proceed here on the *quia timet* principle: *Antrobus* v. *Davidson* (2).

Sir *H. Jackson*, Q.C., Mr. *Rotch*, and Mr. *Charles Peile*, appeared for the *North and South Wales Bank*, which submitted without contest to any order that might be made. They did not, therefore, address the House.

Mr. *Kay* replied.

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THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the Appellants, *Duncan, Fox, & Co.*, are liable, as indorsers of three bills of exchange, dated the 25th of November, 1875, drawn upon and accepted by a firm of *Samuel Radford & Sons*, for the total amount of £8920 15*s.* 3*d.*, and given to *Duncan, Fox, & Co.*, in part payment for wheat sold by them to *Samuel Radford & Sons*. The other Appellants, *Jonathan Robinson & Co.*, are liable as drawers and indorsers of two other bills, also drawn upon and accepted by *Samuel Radford & Sons*, under dates the

(1) 2 Cox, 86. (2) 3 Mer. 569.

19th of November and the 14th of December, 1875, for the total amount of £5432 7*s.* 6*d.*, on account of other wheat sold to *Samuel Radford & Sons.* All these bills were discounted, in the usual course of business, with the *North and South Wales Bank*, without any special agreement; and the bank has never parted with and still holds them. *Samuel Radford & Sons* stopped payment in January, 1876, and on the 24th of February following executed a deed of inspectorship, under which their joint and separate estates are applicable for the benefit of their creditors, parties thereto, who are represented by the Respondents. Neither the Appellants nor the bankers are parties to that deed. The first of the five bills in question became due on the 22nd of February, three others on the 28th of February, and the last on the 17th of March, 1876. They were all duly presented for payment, and dishonoured, and notice was duly given of dishonour. Some payments have been made by the acceptors on account; and the amount now remaining due upon them is claimed by the bank, as to three from *Duncan, Fox, & Co.*, and, as to two, from the other Appellants. The Appellants are ready and willing to meet their liabilities on these bills, but they insist that a sum of £5921 19*s.* 6*d.* now in the hands of the bank, which has been realized from securities held by the bank under a certain memorandum of deposit, dated the 1st of December, 1874, ought to be applied to relieve them as far as it will extend, and also that the securities yet remaining unrealized under the same memorandum (valued at about £2000), ought to be handed over to them, on payment of the balance which, after the application of the £5921 19*s.* 6*d.*, will remain due upon the bills. This claim is resisted by the Respondents, who, for this purpose, may be regarded as standing in the shoes of *Samuel Collins Radford*, one of the partners in the firm of *Samuel Radford & Sons.*

The deposit consisted of the title deeds of certain real estate at *Liverpool*, belonging absolutely to *Samuel Collins Radford*, which, by the memorandum of the 1st of December, 1874, were pledged to secure to the bank (whose customers *Samuel Radford & Sons* were), "the balance for the time being owing to the said bank by *Samuel Radford & Sons* for discounts and advances, and for all other moneys in or for which the said firm, whether alone or

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jointly with any other person or persons, were or might, from time to time thereafter be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm." At the time when the present question arose all dealings and accounts between the bank and *Samuel Radford & Sons* had been closed, and nothing remained due to the bank, under the memorandum of deposit, except the balance then unpaid upon those bills. The property from which the sum of £5921 19*s.* 6*d.* was realized was sold by the bank after the commencement of the action. The bank is before the Court (subject to its right to receive payment of the balance due on the bills and of its costs) merely as a stakeholder. In its answer it professes to be "desirous of acting with entire impartiality, and holding an even hand between the Plaintiffs and the Defendants, and of dealing with the securities and the proceeds thereof under the direction of the Court;" and it offers, on receiving payment of what is due to it, to pay over any surplus, and to assign any property comprised in its security which may remain unsold, to such persons as the Court may consider entitled.

The question, therefore, as to the proper appropriation of the £5921 19*s.* 6*d.* and the remaining securities, is between the Respondents, claiming in right of *Samuel Collins Radford* (one of the acceptors), and the Appellants, the indorsers of the bills of exchange; and it ought, I conceive, to be determined upon the same principles as if the Appellants had actually paid the bills, and as if the bank had paid the proceeds of the securities either to the Appellants, or into Court in this action. If, in either of those events, *Samuel Collins Radford* would have been entitled to an order against the Appellants for repayment, or for payment out of Court of such proceeds, to be applied as part of his estate under the inspectorship deed, your Lordships' judgment ought now to be for the Respondents: if not, the Appellants are right. The Vice-Chancellor of the Palatine Court of *Lancaster* thought that the Appellants were right; and, with the utmost respect to the Court of Appeal (which thought otherwise), I am of the same opinion.

In examining the principles and authorities applicable to this question, it seems to me to be important to distinguish between

three kinds of cases: (1.) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2.) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3.) Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

It is, I conceive, to the first of these classes of cases, and to that class only, that the doctrines laid down in such authorities as *Owen* v. *Homan* (1), *Newton* v. *Chorlton* (2), and *Pearl* v. *Deacon* (3) apply in their full extent. If, so far as the creditor is concerned, there is no contract for suretyship, if the person who has (in fact) made himself answerable for another man's debt is, towards the creditor, no surety, but a principal, then I think that the creditor would not be subject to those special obligations which were described by Lord *Truro* in *Owen* v. *Homan* (4), and would not, generally, have his powers of dealing with securities circumscribed and restricted in the manner described by Vice-Chancellor *Wood* in *Newton* v. *Chorlton* (5), and by Lord *Romilly* and the Lords Justices in *Pearl* v. *Deacon* (3). If, for example, in *Pearl* v. *Deacon* (3) the contract of suretyship had been only between *Pearl* and *Pearson inter se*, Messrs. *Deacon* dealing with them both as principals, and not with *Pearl* as a surety, I should take it to be clear that Messrs. *Deacon* might have distrained upon goods comprised in their security for the rent due to them from *Pearson*, without losing (as they did in the actual case) their remedy against *Pearl*. The difficulties, therefore, which in the present case appear to have weighed most upon the minds of the Judges in the Court of Appeal, would not ordinarily arise, unless there was a contract of suretyship properly so called, not

(1) 3 Mac. & G. 378.
(2) 10 Hare, 646.
(3) 24 Beav. 186; 1 De G. & J. 461.
(4) 3 Mac. & G. pp. 396–7.
(5) 10 Hare, p. 651.

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between the two debtors only, but between them and the creditor also.

It is, however, consistent with this that the person who, as between himself and another debtor, is in fact a surety (though the creditor is no party to that contract of suretyship), has, against that other debtor, the rights of a surety; and that the creditor, receiving notice of his claim to those rights, will not be at liberty to do anything to their prejudice, or to refuse (when all his own just claims are satisfied) to give effect to them. The judgment of Lord Justice *Turner*, in *Davies* v. *Stainbank* (1) and the the cases of *Ex parte Hippins & Harrison* (2) and *Liquidators of Overend, Gurney, & Co.* v. *Liquidators of Oriental Financial Corporation* (3) are founded, as I understand them, on this view of the law. In such cases the equity is direct in favour of the surety-debtor against the principal debtor; but it affects the creditor towards whom they are both principals only as a man who has notice of the obligations of one of his own debtors towards the other. As between the two debtors, the "established principles of a Court of Equity," to which Sir *Samuel Romilly* referred in his argument in *Craythorne* v. *Swinburne* (4), judicially approved by Lord *Eldon* (5), are fully applicable. "Natural justice" (it was there argued) "requires that the surety shall not have the whole thrown upon him, by the choice of the creditor not to resort to remedies in his power." In *Aldrich* v. *Cooper* (6) Lord *Eldon* speaks of a surety's equity as resting upon the same principles with that of marshalling, when one creditor of the same debtor is able to resort to either of two funds, and another creditor to only one. "It is not," (he says) "by force of the contract, but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court placing the surety exactly in the situation of the creditor." And soon afterwards (where he speaks of marshalling), "The principle, in some degree, is that it shall not depend upon the will of one creditor to disappoint another;"

(1) 6 D. M. & G. 694.
(2) 2 Glyn & Jameson, 93.
(3) Law Rep. 7 H. L. 348.
(4) 14 Ves. 162.
(5) 14 Ves. at p. 165.
(6) 8 Ves. 382, 389.

and (1), "The Court has said that if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that which, paying him, will leave another fund for another creditor." And in *Younge* v. *Reynell* (2) Vice-Chancellor *Turner* said: "When Lord *Eldon* says it is against conscience to sue the surety, it must be considered what is the meaning of that expression, and why this Court considers it against conscience that the surety should be sued; and I take it to be because, as between the principal and surety, the principal is under an obligation to indemnify the surety; and it is, I conceive, from this obligation that the right of the surety to the benefit of the securities held by the creditor is derived. The principle is not, I think, much dissimilar to that which applies where a man directs part of his estate to be employed in carrying on a trade, in which case the creditors of the trade have a right to resort to that part of the estate, because the trustees have a right to be indemnified out of it."

It appears to me that these principles of Equity are not less applicable to cases of the third class,—cases in which there is, strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right to re-imbursement or indemnity from the other,—than to those of the second class, in which there is a contract of suretyship to which the creditor is not a party. To this third class of cases, the rights of an indorser against an acceptor of a bill of exchange may most properly be referred. The liability of the indorser to the holder is, by the law merchant, conditional, and (as was said by Mr. Justice *Buller*, in *Tindal* v. *Brown* (3)) "only secondary;" but, when the conditions required by that law are fulfilled, it becomes absolute, and is that of a principal; and the indorser's right, if he pays the holder, to recover over against the acceptor is not founded on any agreement between him and the acceptor (who is as likely as not to be a stranger without any communication with him before the indorsement), but is established by the same law. But contracts of this kind, as well as surety-

(1) 8 Ves. p. 391. (2) 9 Hare, 819.
(3) 1 T. R. 170; affirmed 2 T. R. 186.

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ships proper, are entered into, by all the parties to them, with a knowledge and in view of the law by which they are governed. The acceptor, though he may know nothing of any particular indorser, knows that by his acceptance he does an act which will make him liable to indemnify any person who may indorse, and may afterwards pay the bills; and he knowingly and intentionally undertakes that liability, as much as if the indorsement were the result of direct communication between himself and that person. Lord *Eldon*, in *Ex parte Younge* (1), said with his usual accuracy (his language being as applicable to an indorser as to a drawer): "The drawer of a bill of exchange is not strictly a surety for the acceptor. In general cases, the acceptor is primarily liable upon the bill, and the drawer may be in the nature of a surety." The statement in *Smith's* Mercantile Law (3rd edition, p. 253) is also correct, and is established by many authorities, that "in the contract by bill or note, the maker or acceptor is considered the principal, and the indorsers as his sureties; and consequently, if the holder either discharge or suspend his remedy against the former, the latter, unless they have previously consented to it, or afterwards promised to pay with knowledge of it, are all immediately discharged." Mr. *Smith* uses, in this passage, the language of Mr. Justice *Chambre* in *Clark* v. *Devlin* (2), who stated that the case of *Darley* v. *English* was decided by Lord *Eldon* (in the Common Pleas) on that principle. I am unable to conceive any ground on which the principle which prevails in cases of suretyship should go so far as this, in favour of the drawer or the indorser, and not also extend (when the indorser is compelled to pay the bill, and when the question arises between him and the acceptor only) to securities deposited by the acceptor with the holder. In the present case the holder has actually in his hands a large sum of money, realized by him from such securities. It is very difficult, on any rational principle, to distinguish the receipt of such a sum, under such circumstances, from an actual payment on account by the acceptor. Of the creditor's right, if he pleases, to apply it in payment of the bills there can be no possible question; yet it is contended that he may, at his option, give the money back to the acceptor, and sue the indorser on the bills; nay more, that, if he

(1) 3 V. & B. 40. (2) 3 B. & P. 366.

does compel the indorser to pay the bills, without applying that money to them, a Court of Equity is bound to leave the burden on the indorser, and restore to an insolvent acceptor the money which has been so realized from the securities. I cannot reconcile such a decision with the doctrines of Lord *Eldon* and Lord Justice *Turner*. No case before the present has been cited, in which the right of a drawer or indorser to the benefit of such securities, as between himself and the acceptor, has ever been denied or doubted. The opinion of Sir *John Byles*, in his very learned Treatise on Bills, is (no doubt) no authority; and I will not lay stress upon the case of *Praed* v. *Gardiner* (1), because, as was observed by Mr. *Marten*, what was really done in that case was to marshal securities held by the creditor according to the equities of the different persons entitled to redeem them, and the exact grounds of the judgment do not appear. But I think that the principles deducible from all the authorities lead, necessarily, to the conclusion, that, under circumstances like the present, the equity between the indorser and the acceptor is the same as that between a surety and a principal debtor when the creditor is not a party to the contract of suretyship. That equity, according to my view of it, need not interfere with the ordinary operation of such a general covering security as that given by *Samuel Collins Radford* to the *North and South Wales Bank*, during the continuance of the dealings between the secured creditor and the acceptor of bills not overdue, which the creditor may hold or part with as he pleases. It will not incapacitate bankers who may hold such a bill, accepted by a customer and indorsed by a third party, from carrying on their dealings with that customer, by varying the securities received from him according to the ordinary course of those dealings, as long as he remains solvent and before the acceptance has been dishonoured. It will not, in my opinion, tend to paralyze the business of discounting bills of exchange. But it is an equity which, in my judgment, does certainly attach, when the bills, overdue and dishonoured, and the securities, are found together in the hands of the secured creditor, at the time when he requires payment from the indorser; when the creditor has no other transactions then depending with the customer, and

(1) 2 Cox, 86.

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no claim upon the securities except for the bills themselves; and when the competition is between the indorser and the acceptor only.

For these reasons, I think that the judgment under appeal is erroneous, unless it can be supported on the ground that the security in this case was given by one only of the partners in the firm by which the bills were accepted. But it appears to me, that it can make no difference whether the security was given by all the acceptors or by one of them. In each case alike, the person giving the security is principal debtor as between the indorser and himself; and the interest, whether of a sole debtor or of one of two or more joint debtors, is not (in my opinion) to be regarded in competition with the equity of any one who is in the nature of a surety for him, and whom he is bound to indemnify.

I therefore propose to your Lordships to reverse the decree appealed from, and to restore that of the Vice-Chancellor of the County Palatine of *Lancaster*. The bankers will take their costs here and below out of the fund arising from the securities; and the Appellants must have their costs here and below out of any surplus remaining from the securities in the first instance, and (so far as the securities may not be sufficient to pay them) from the Respondents.

LORD BLACKBURN:—

My Lords, the *North and South Wales Bank* had, amongst its customers, a firm of *Samuel Radford & Sons*. The bank had taken from *Samuel Collins Radford*, one of the partners in that firm, the title deeds of some property belonging to him with two memorandums, by which he acknowledged to have delivered the title deeds in pledge to secure to the bank whatever might be owing from the firm to the bank.

I do not think it either necessary or desirable to inquire what might have been the rights of the various parties under all the complicated state of things which might have arisen during the winding-up of the transactions between the bank and *Samuel Radford & Sons*. It is enough to consider the state of facts which has in this case actually occurred.

The bank had discounted for one of the Appellants two bills of

exchange, and for the other Appellant three bills of exchange accepted by the firm of *Samuel Radford & Sons*, payable at a bank in *London*. These bills were indorsed by the Appellants respectively. At maturity they were dishonoured, and the firm was consequently liable to the bankers as holders of them, so that the equitable mortgage was held in pledge to the bank to cover, amongst other things, those bills. The bank gave due notice of dishonour to the several indorsers respectively, and they became bound to pay, to the bankers as holders, the amount of the bills, on having the bills delivered to them so as to remit them to their former rights as holders against the acceptors and any indorsers prior to themselves.

The estate pledged to the bank has, in fact, been converted into money, and partly from that source, and partly from others, most of the liabilities of *Samuel Radford & Sons* to the bank have been discharged in full, and some payments have been made by the acceptors on account of the bills in question. And now it is ascertained that after all liabilities of the partners to the bank, except those on the five bills in question, have been discharged, there will remain on the equitable mortgage, partly realized, a considerable surplus, though not sufficient to pay the bills in full. The indorsers offer to pay the bills on having credit for the money realized, so far as not applicable to other purposes, and having the equitable mortgage transferred to them. *Samuel Collins Radford* has not become bankrupt, but the general creditors of the firm insist that the indorsers of the bills ought to be made to pay in full, and then that the surplus of the pledged estate should be delivered to *Samuel C. Radford* to be applied for the general benefit. The Appellants have filed this bill to have the memorandums and the title deeds, together with the bills of exchange, delivered to them, on payment by them of what remains due to the bank on the bills. The bank is sure to be paid in full either way, and having no interest in the matter, does not wish to favour either party, and submits to deal with the bills of exchange and equitable mortgages, after satisfaction of the principal moneys, interest, and costs, as the Court may direct.

The Vice-Chancellor held that the Appellants were entitled to

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what they claim. The Lords Justices reversed his decision, and the substantial question before the House is, whether the indorsers of the bills have such a right.

I think it is clear that they have no such right by contract. They did not at the time when they got the bills discounted at the bankers so much as know that the bank held any security from *Samuel Radford & Sons*, and of course, that being the case, made no express stipulation about it; and there is nothing in the nature of an indorsement for value to give the indorser any right, during the currency of the bill, to any security which either his immediate indorsee, or any other holder of the bill, may have from any party to the bill. The indorser, by the law merchant, is liable, on having due notice of dishonour, to pay the amount of the bill to the holder for the time being, on having the bill restored to him; but till the bill is dishonoured there is nothing to prevent the party who may be the holder for the time being indorsing it, even without recourse, so as to make it impossible that he can ever be the person to whom the prior indorser will have to pay the bill. I think, therefore, with the Lords Justices, that there is neither principle nor authority for saying that the indorsers are, during the currency of the bill, sureties, or in the nature of sureties to the indorsee, or that they have any equity to prevent the indorsee from dealing as it may seem to him most desirable, with any other parties unless thereby he prevents himself from giving notice of dishonour, so as to give them their remedy against prior parties to the bill; and I agree with them in thinking that any contrary decision would be very mischievous.

But though the indorsers had no such right by contract, yet after the bills were dishonoured and notice of dishonour had been given to the indorsers, the position of the parties is altered. Though the indorser is primarily liable as principal on the bill, and is not strictly a surety for the acceptor, he has this in common with a surety for the acceptor, that he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor. And now the state of affairs is so far cleared up, that the bank had, besides the right to come upon the indorsers, a

right to come upon the security pledged to the bank by *Samuel Collins Radford.*

I think it is established by the case of *Deering* v. *Lord Winchelsea* (1), and the observations on that case by Lord *Eldon* in *Craythorne* v. *Swinburne* (2), and Lord *Redesdale* in *Stirling* v. *Forrester* (3), that where a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion. This is quite independent of any contract between the parties thus liable. Lord *Eldon,* in *Craythorne* v. *Swinburne* (2), says of *Deering* v. *Lord Winchelsea:* "That case also established that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction." And Lord *Redesdale,* in *Stirling* v. *Forrester* (4), says: "The principle established in the case of *Deering* v. *Lord Winchelsea* (1) is universal, that the right and duty of contribution is founded upon doctrines of equity, it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience (if not by contract) to give to the party paying the debt all his remedies against the other debtors. . . . He (the creditor) is bound, seldom by contract but always in conscience, as far as he is able, to put the party paying the debt upon the same footing as with those who are equally bound. That was the principle of decision in *Deering* v. *Lord Winchelsea* (1), and in that case there was no evidence of contract." And this last principle, that the person making payment of more than his due proportion is entitled to have assigned to him all rights and securities of the creditor for the purpose of, by means thereof, obtaining contributions, is recognised and enacted by the 19 & 20 Vict. c. 97, s. 5.

I think that though the indorser of a bill is not exactly a surety for the acceptor, or a co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety to bring him within the principle of *Deering* v. *Lord Winchelsea* (1).

(1) 2 B. & P. 270.
(2) 14 Ves. 165.
(3) 3 Bli. 575.
(4) Ibid. at p. 590.

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If this be correct, it seems to me that the question in the present case is reduced to this: what are the due proportions as between the indorsers and the security created by one of the acceptors on his separate estate? If a third person, not a member of the firm or liable for its engagements, had become surety or pledged his estate as security to the bank for the general balance due to it from the firm, it might be contended, at least plausibly, that he became only surety for the balance after all indorsers had paid, and was therefore entitled to say that, as between him and the indorser, the indorser should pay all before the surety paid anything. I do not express any opinion how that would be. But the owner of the pledged estate in this case was himself one of the firm and an acceptor of the bill, and as such liable to the indorser. And if the bank had applied the whole of the proceeds of the security, as far as they went, to the payment of these bills, it seems quite clear that *Samuel Collins Radford* could not have come on the indorsers to repay him part of the debt which he had thus paid. The answer would have been that he was, as between him and the indorsers, bound to pay the whole. And it follows, that if the bank comes upon the indorsers first, they must have the right to be recouped out of the security, unless the bank had an option to favour whichever set of those liable it pleased, which the reasoning of Lord *Eldon* seems to me to treat as manifestly inconsistent with the doctrine of equity.

I have, therefore, come to the conclusion that the decision below ought to be reversed.

I have not done so without some hesitation. For it is not to be denied that the result is that the indorsers of bills who happen to have discounted them with other banks are worse off than the Appellants, who, by what as regards them is a lucky chance, have got the benefit of this security. I am afraid to question the justice of a rule approved by such great lawyers as Lords *Eldon* and *Redesdale*, though Lord *Eldon* does not seem at first to have approved of *Deering* v. *Lord Winchelsea* (1); but if it were *res integra* I am by no means sure that it would not have been better to say that every one should have the full extent of his rights

(1) 2 B. & P. 270.

given by contract, express or implied, and no more. But I think the unbroken current of authority from *Deering* v. *Lord Winchelsea* (1), decided in 1787, very nearly a century since, renders it impossible now to indulge in such speculations.

I agree to the order as to costs which has been proposed by the noble and learned lord on the woolsack.

LORD WATSON:—

My Lords, I shall endeavour very briefly to indicate the grounds upon which I agree with your Lordships in holding that the judgment of the Lords Justices ought to be reversed, and that of the Vice-Chancellor restored. I should have had difficulty in coming to that conclusion had it had not been that in the present case there are certain special circumstances, and that there are authorities in the law of *England* applicable to these circumstances, which do not seem to have been taken into consideration by the Court of Appeal.

It does not appear to me that the broad proposition maintained by the Appellants at the Bar of the House and elsewhere, to the effect that the indorser of a bill of exchange becomes entitled, in a question with the holder, to the same equities as if he had been a proper surety for the acceptor, has any foundation in law. To give these equities to an indorser before the bill falls due would, in my opinion, be inconsistent with the nature of a bill of exchange, and the rights and obligations which it creates in favour of and against the parties to it; and I entirely agree with the observations of the Master of the Rolls upon the grave inconveniences to which bankers and merchants would be exposed by the introduction of such a principle, so far as these observations apply to the period of the bill's currency.

The special circumstances which appear to me to be of vital importance to the decision of the present case are these: that at the time when the bills in question matured, the bankers had brought their dealings with the acceptors to a close, in consequence, apparently, of the insolvency of the latter, and that the bank then held securities sufficient, when realised, not only to pay off all

(1) 2 B. & P. 270.

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other debts due by the acceptors, but also to cover, if not in whole, at least in great part, the liabilities of the acceptors upon these bills.

That the bankers had power, in terms of the memoranda of deposit by *Samuel Collins Radford*, to apply the balance of their securities in extinction of the indebtedness of the firm of *Samuel Radford & Sons* upon the bills in question, does not admit of doubt. Accordingly, the bank had a legal right to recover from the indorser, who became directly liable to them upon the failure of the acceptors to honour the bills, and had also a legal right under their arrangement with *Samuel Collins Radford*, a partner of the acceptors' firm, to obtain payment out of the free balance of the securities deposited by him. In a question with the bank the acceptors and the indorsers were alike principal debtors, but the bankers knew, at least it came to their knowledge before they had exacted payment from either, that in a question with the indorsers the acceptors were, in reality, as well as *ex facie* of the bills, primarily liable. In these circumstances it is obviously immaterial to the bankers from which source they obtain payment of their debt.

In the present case *Samuel Collins Radford* cannot, in my opinion, plead that he did not intend to become liable for the dishonoured acceptances of his firm, discounted with the *North and South Wales Bank*, and seeing that the real conflict of interests lies between him and the indorsers, I think it would be inequitable to compel payment from the indorsers until the securities given by him to the bank have been exhausted.

But, my Lords, I conceive that there is abundant authority in the law of *England* conclusive in favour of the indorsers' claim. I shall not refer in detail to the series of decisions which have been fully dealt with by your Lordships. They satisfy me that it has long been a settled rule of Equity that, in circumstances analogous to those of the present case, the creditor is bound to take payment from that one of his debtors who is *inter eos* primarily liable for his debt.

I have only to add that, whilst it is my opinion that the indorser is not in the likeness, and therefore cannot claim the equities of a

surety, so long as the bill is current, I am not prepared to hold that he becomes necessarily, and in all circumstances, entitled to these equities whenever the bill matures. It is possible that, after maturity, the holder of the bill may have such interest, arising from his relations with the acceptor, as will entitle him even then to deal with his securities without respect to the interests of the indorser. But the solution of these questions is unnecessary for the disposal of the present case.

Order appealed from reversed; decree of the Vice-Chancellor of the County Palatine of Lancaster restored, with directions as to costs, and cause remitted.

Lords' Journals, 27th Nov., 1880.

Solicitors for Appellants: *G. L. P. Eyre & Co.*
Solicitors for Respondents: *Gregory, Rowcliffes, & Rawle*

[HOUSE OF LORDS.]

H. L. (E.) 1880 Nov. 24, 27.

WILLIAM AND FRANK DEBENHAM . . APPELLANTS;

AND

ALFRED MELLON . . . . . RESPONDENT.

Husband and Wife—Necessaries—Agency—Notice not to trust.

Where the husband neither does, nor assents to, any act to shew that he has held out his wife as his agent, to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. That question is one of fact.

The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband and wife. Otherwise where such management did not exist.

A. was the manager of a limited company's hotel at *Bradford*—where his wife acted as manageress—they cohabited—he made his wife an allowance for clothes, but forbad her to pledge his credit for them. She purchased clothes in *London*, the bills for which were at first made out in her name and were paid by her. She afterwards incurred, with the same tradesmen, a debt for clothes, payment for which was demanded from the husband, with whom, previously, they had had no communication :—

Held (affirming the judgment of the Court below), that the husband was not liable—that under the circumstances here the mere fact of cohabitation did not raise a presumption of agency, nor require a proof of notice not to trust the wife.

APPEAL against a decision of the Court of Appeal which had affirmed a judgment of the Queen's Bench Division upon a ruling of Mr. Justice *Bowen*.

The Appellants brought an action against the Defendant for the price of goods supplied to his wife. The statement of claim described the goods as sold and delivered to the Defendant, ordered for him by his wife as his duly authorized agent in that behalf.

The defence denied that the goods were ordered by the Defendant's wife as his agent, alleged that his wife was not his agent in that behalf, and had no authority express or implied to pledge his credit for the goods, as the Plaintiffs knew or ought to have known. Issue thereon.

The cause was tried in *London* before Mr. Justice *Bowen* and a jury. The Plaintiffs were drapers in *London*—the goods were admitted to be necessaries suitable for the condition of the wife, and the prices were admitted to be reasonable. It appeared from the evidence offered by the Defendant, that, by an arrangement between the husband and wife he was to furnish her with £52 a year (on some occasions increased to £62) with which she was to supply herself and their children with clothes, and that he had positively forbidden her to exceed that allowance. The husband and wife were employed as manager and manageress of the hotel of a (limited) company, first in *Devonshire* and then at *Bradford*. They lived together in the ordinary way. The question left by the Judge to the jury was whether at the time when the goods were ordered, the Defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to do so. This question was answered in the affirmative, whereupon judgment was ordered to be entered for the Defendant. The Queen's Bench Division refused a new trial.

The Plaintiffs appealed, and the case was heard before Lords Justices *Bramwell*, *Baggallay*, and *Thesiger*, who, following and adopting the decision in *Jolly* v. *Rees* (1), affirmed the ruling in the Court below (2). This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *A. L. Smith*, for the Appellants :—

The decision in this case depends on that of *Jolly* v. *Rees* (1), which was not the unanimous judgment of the Court, and which it is submitted cannot be, in principle, sustained. There is no question as to the goods being necessaries suitable to the condition of the wife, nor any as to the fact that the parties were cohabiting as man and wife, but the defence is that the husband had forbidden his wife to pledge his credit, and that consequently the husband was not liable for goods supplied upon her order. Assuming it to be proved that the husband had forbidden the wife to pledge his credit, his doing so being perfectly secret, it could not be binding as against the rest of the world, who had never received any notice of it, and had no reason to suspect its existence.

(1) 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177. 10 Jur NS. 319
(2) 5 Q. B. D. 394.

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A wife has, what may be called, apparent, or ostensible authority to pledge her husband's credit for things that are required in the family and are necessaries for the family. It is admitted that, as a rule, where a tradesman is aware that a wife had been forbidden to contract any debts, if he enters into dealings with her he does so at his peril. But even that rule was not wholly without exception, as where a man turned his wife out into the world without any, or even without a reasonable allowance, *Bolton* v. *Prentice* (1), she was entitled to provide necessaries for herself at his cost: *Emmett* v. *Norton* (2). In *Comyns'* Digest (Baron and Feme Q.) it is said "if a wife buy necessary apparel for herself the assent of the husband shall generally be intended." That was again and again asserted in the observations of all the Judges in the old case of *Manby* v. *Scott* (3), which case was the foundation of the doctrine now sought to be applied in all cases for the advantage of husbands. The observations there qualified the decision itself. And it was to be observed that in that case the "Plaintiffs had been forbidden to sell to or trust the wife," and consequently that express prohibition to them did afford an answer to their demand. There, too, the wife had wilfully absented herself from her husband's house for a long time and then attempted to force her society upon him, so that in no way whatever could the case be deemed a precedent for the present decision. Nor was the case of *Montague* v. *Benedict* (4) applicable here, for the goods there supplied were distinctly not necessaries, and the conduct of the Plaintiffs left little doubt that they were well aware that the husband knew nothing of the transaction. So in *Seaton* v. *Benedict* (5) the circumstances were similar, but the point really decided there was that too much weight had been given by the Judge, at the trial, to the effect of a payment into Court, and a new trial was ordered on that ground. In *Ruddock* v. *Marsh* (6) it was held that a wife is the agent of her husband for such things as are usually under the control of the wife (a doctrine which had been stated almost in the same words by Mr. Justice *Bayley* in *Montague* v. *Benedict* (4)) and so the husband was held liable for provisions supplied to the family, though

(1) 2 Str. 1214.
(2) 8 C. & P. 506.
(3) 1 Sm. L. C. 341; 1 Lev. 4; 1 Sid. 109.
(4) 3 B. & C. 631.
(5) 5 Bing. 28.
(6) 1 H. & N. 601.

it was proved that he regularly paid his wife an allowance to keep the house. That case ought to govern the present. In *Johnston* v. *Sumner* (1) it was expressly stated that during cohabitation a wife has implied authority as the agent of her husband to pledge his credit for necessaries suitable to her station notwithstanding any private agreement between them; but there the husband and wife were separated, she had a sufficient allowance, and the things furnished were expensive dresses, in no respect suitable necessaries. In *Todd* v. *Stokes* (2) the husband was held not liable because the parties had separated and she had an allowance, which was generally known. And the same rule appeared to have been applied in *Hodgkinson* v. *Fletcher* (3) where they lived separately from each other, and where there had been proceedings in the Ecclesiastical Court from which it was publicly known that the wife had an ample allowance. It was under those circumstances the husband was held not liable. Here there were no circumstances of that sort. In *Etherington* v. *Parrott* (4) the parties cohabited, but there being distinct notice given to the tradesman, Lord *Holt* held, upon that ground, that he could not recover. In *Holt* v. *Brien* (5) the husband was treated as not being liable, because the tradesman had full notice of the facts. [LORD BLACKBURN :—The marginal note in that case is defective.] It does not state the matter fully, but the case itself shews that the Court went upon the fact of notice. The case of *Freestone* v. *Butcher* (6) was a strong illustration of the necessity of notice where even an implied liability had arisen, the things supplied there not being in any way necessaries and the assent of the husband being little more than inferential.

The relation of husband and wife gives the wife a general credit for necessaries: *Read* v. *Legard* (7), where that principle was applied, though the husband was a lunatic, and therefore incapable of expressing either assent or dissent. And that principle applied as to all matters under the proper control of a wife. Even the cases in which the husband has avoided liability admit that

(1) 3 H. & N. 261.
(2) 1 Ld. Raym. 444; 1 Salk. 116.
(3) 4 Camp. 70.
(4) 2 Ld. Raym. 1006; 1 Salk. 118.
(5) 4 B. & A. 252.
(6) 6 C. & P. 643.
(7) 6 Ex. 636.

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principle: *Dyer* v. *East* (1) and the recent case of *Read* v. *Legard* (2). It was also affirmed in *Story* on Agency (3). And in *Waithman* v. *Wakefield* (4), Lord *Ellenborough* had said, "Where a husband is living in the same house with his wife he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value." It was expressly on that ground that the husband was held liable in *Ruddock* v. *Marsh* (5), and the same principle was applied in all the cases, the exception being, in every instance, confined to such as arose from the particular circumstances of the individual case. The mere representation made by the man that the woman was his wife had been held to make him liable for necessaries supplied to her, *Munro* v. *De Chemant* (6); and in *Ryan* v. *Sams* (7), where, though the woman was known not to be the wife, yet, as the man had treated her for some time in the character of wife, and had allowed her to order fittings up for the houses they occupied, and had paid for those fittings, he was considered to have constituted her his agent, so that he was held liable upon similar orders given by her after they had really separated, the tradesmen not having had any notice of the fact of the separation. It would be absurd to treat in such matters a wife as less an agent of the husband than one man would be the agent of another in a matter of ordinary business, even without any partnership between them. A few acts done by *B.* in the matter of the business of *A.*, and acted upon by *A.*, were allowed to go the jury in proof of agency, which, if once established, required notice to the person dealt with, before that agency could be denied. And the doctrine of apparent agency and continuing credit was exemplified in *Norton* v. *Fazan* (8), where the absence of notice sufficed to make the husband liable, though he had in fact separated from his wife and she was living in adultery. Where, as in this case, the tradesmen dealt with the wife in ignorance and good faith, and the things supplied were really necessaries, and the parties were cohabiting with each

(1) 1 Mod. 9 (per Kelynge, C.B.)
(2) 6 Ex. 636.
(3) §§ 17, 126.
(4) 1 Camp. 120.
(5) 1 H. & N. 601.
(6) 4 Camp. 215.
(7) 12 Q. B. 460.
(8) 1 B. & P. 226.

other, nothing but distinct notice could free the husband from his liability.

Mr. *Willis*, Q.C., and Mr. *McGall*, for the Respondent:—

In this case it should be recollected that, in fact, the Plaintiffs had never known anything of the Defendant, had had previous dealings with the wife, and with her alone, and had made out their bills in her name, and therefore never could set up anything in the way of proof of the husband's assent to her acts. She came to the Plaintiffs as a perfect stranger, ordered goods from them, which they supplied, and for which, having previously given credit to her individually, they now sought to charge her husband. The facts of the case, therefore, were strongly adverse to the claim now put forward. They had in truth no knowledge of the husband till they set up this claim against him for goods which the wife had purchased without his knowledge and against his formal prohibition. The principle which ought to govern a case like the present was stated by Lord Chief Justice *Cockburn* in *Atkyns* v. *Pearce* (1), namely, that there being a sufficient allowance provided, there was no necessity for pledging the husband's credit. There was no ground for supposing that the presumption of agency arising from the cohabitation could only be contradicted by notice to the tradesman. In *Reneaux* v. *Teakle* (2) the husband and wife were living together; he made her an allowance for dress, she bought articles of dress beyond her allowance, and the husband was sought to be charged; he was held not liable, though there was no proof of notice; and the fact that she had bought other articles of dress from other people, besides those furnished by the Plaintiff, was admitted in evidence as rebutting any presumption of agency that might arise from cohabitation. *Bolton* v. *Prentice* (3) cannot be treated as an authority for the Appellants, for the only question really decided there was that when a man causelessly turned his wife out of doors he could not declare a general prohibition to give her credit, so that she could not get necessaries anywhere, and might be left to starve. In *Reid* v. *Teakle* (4) the

(1) 2 C. B. (N. S.) 763; 26 L. J. (C. P.) 252.
(2) 8 Ex. 680.
(3) 2 Str. 1214.
(4) 13 C. B. 627: 22 L. J. (C. P.) 161.

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question was whether the case had properly been left to the jury; the goods supplied there consisted of music books, and the only question put to the jury was whether music books were necessaries, which the Court thought wrong, and so directed a new trial. In *Atkins* v. *Curwood* (1) it was expressly declared that a husband is not bound by the contracts of his wife unless made with his assent. In *Freestone* v. *Butcher* (2) there was no question as to necessaries, the things purchased were foreign birds, and the husband was held liable because he had fitted up a room for their reception, and his assent to the purchase was therefore considered clear. The same observation applies to *Munro* v. *De Chamant* (3) and *Ryan* v. *Sams* (4). In *Mizen* v. *Pick* (5) it was expressly declared that where there was a sufficient allowance notice to the tradesman was not material, and that was the principle acted on in *Richardson* v. *Du Bois* (6). Here there was a sufficient allowance; there was an express prohibition, and if there was no notice it was clear that the Appellants had never known anything of the husband, and had never, in reality, supplied the goods on his credit.

The case of *Montague* v. *Benedict* (7) laid down the rule clearly that the husband is not liable if he supplies his wife with proper necessaries. And the question of the sufficiency of the allowance was not one on which a Court can, of itself, establish the liability of the husband: *Eastland* v. *Burchell* (8), where the Judge of a County Court having on that ground given a judgment against the husband, his decision was set aside.

In *Shoolbred* v. *Baker* (9), Mr. Justice *Willes* treated the case as settled in the law of *England*—and in an Irish case, *Moylan* v. *Nolan* (10), the Judges of the Court agreed that the payment of a sufficient allowance for the supply of the household would be an answer to any presumption arising from the mere relationship of husband and wife, even though the goods supplied were necessaries for the family, and were left at the husband's house and consumed in the family of the husband.

(1) 7 C. & P. 506.
(2) 6 C. & P. 643.
(3) 4 Camp. 215.
(4) 12 Q. B. 460.
(5) 3 M. & W. 481.
(6) Law Rep. 5 Q. B. 51.
(7) 3 B. & C. 651.
(8) 3 Q. B. D. 432.
(9) 16 L. T. 1357.
(10) 17 Ir. C. L. Rep. 427.

Mr. *Benjamin* replied.

1880. Nov. 27. THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, you are asked in this case to review the decision of the Court of Common Pleas in 1864, in *Jolly* v. *Rees* (1), the correctness of which, as far as I know, has not been seriously controverted since that time.

The point determined was one of much importance; namely, that the question, whether a wife has authority to pledge her husband's credit, is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances.

That principle is now controverted; and the first question before your Lordships is, whether the mere fact of marriage implies a mandate by law, making the wife (who cannot herself contract, unless so far as she may have separate estate) the agent in law of her husband, to bind him, and to pledge his credit, by what otherwise would have been her own contract, if she had been a *feme sole?* On that point, I think it enough to say, that, according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity; a necessity which may arise, when the husband has deserted the wife, or has by his conduct compelled her to live apart from him, without properly providing for her,—but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no *primâ facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing.

I therefore lay aside that proposition; and, thinking it clear, that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present to consider, I pass to the next question; whether the law implies a mandate to the wife, from the fact, not of marriage, but of cohabitation? If it does, on what principle? Cohabitation is not

(1) 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177.

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(like marriage), a *status*, or a new contract; it is a general expression for a certain condition of facts. If, therefore, the law did imply any such mandate from cohabitation, it must be as an implication of fact, and not as a conclusion of law. There are, no doubt, various authorities, which shew that the ordinary state of cohabitation between husband and wife does carry with it some presumption, some *primâ facie* evidence, of an authority to do those things, which, in such ordinary circumstances of cohabitation, it is usual for a wife to do. Mr. *Benjamin* says, that those words are not the best which might be used for the purpose; but that "apparent authority," or "ostensible authority," would be better. I am not at all sure that Mr. *Benjamin's* words may not be very good words, for that ordinary state of circumstances, in the case of cohabitation between husband and wife, out of which the ordinary presumption arises; because, in that state of circumstances, the husband may truly be said to do acts, or habitually to consent to acts, which hold the wife out as his agent for certain purposes. Then, the word "apparent," or the word "ostensible," becomes appropriate. But where there has been nothing done, nothing consented to, by the husband, to justify the proposition that he has ever held out the wife as his agent, I apprehend that the question whether, as a matter of fact, he has given the wife authority, must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which the husband ought to be held responsible. If he has so acted he may be bound; but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so when they speak of this as a presumption *primâ facie*, and not absolute; not a presumption of law, but one capable of being rebutted. When Chief Baron *Pollock*, in *Johnston* v. *Sumner* (1), said, that all the usual authorities of a wife under those circumstances might be assumed, "notwithstanding any private arrangement," I suppose him to have had in view that state of facts, under cohabitation, when a

(1) 3 H. & N. at p. 268.

wife is managing her husband's house and establishment, which usually raises the presumption. If an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife, it may be right to hold, that, as between the husband and a person relying upon that appearance of authority, it cannot be got rid of by a mere private understanding or agreement between the husband and wife. The same learned Judge in another case which was cited during the argument, viz., *Reneaux* v. *Teakle* (1) said, that the case of the wife, in principle at all events, was not different from that of anybody else at the head of an establishment. If there is an establishment of which there is a domestic manager, although the wife may be the most natural domestic manager, and though the presumption may be strongest when she is so, yet the same presumption may, and often does, arise from similar facts, when the actual manager is not a wife, but merely a woman living with a man, and passing as his companion, with or without the assumption of the name of wife. It is also the same when the person to whom the domestic management is delegated is a housekeeper or a steward, or any other kind of superior servant. Therefore it is, in all these cases, really a mere question of fact.

Now, my Lords, in the present case, that ordinary state of circumstances which usually accompanies cohabitation where there is a house and an establishment, is entirely wanting. There was here no house, no establishment; none of those things was done, in the way of living upon credit, to provide for the ordinary and daily wants of a family or an establishment, which commonly raise the presumption. The husband and wife were both servants of a company of hotel keepers at *Bradford*. They lived in the hotel, which belonged to their employers; their whole board and lodging (which I take, upon the evidence, to have included that of their children) being found for them by the company; and therefore there was, in point of fact, no domestic management at all. The credit, such as it was, was given by a *London* tradesman to a woman living in *Bradford* in these circumstances. No single act is shewn to have been done by him upon the faith of any appearance of authority in the wife; he made out all the bills to

(1) 8 Ex. at p. 682.

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the wife in her own name. This, no doubt, would not have prevented him from recovering against the husband, if the husband was otherwise liable, but it certainly does not tend to shew that he supposed he was giving credit to the husband; much less that he was misled into doing so by any conduct of the husband. That the husband never knew any of these things is perfectly clear. The necessary conclusion of fact is, that the husband did not hold out his wife as having any authority, by any act, or by any course of conduct, either to the Plaintiff or to any other persons, of whose dealings the Plaintiff might be presumed to have cognizance.

Then, if the Plaintiff can recover at all, it can only be because there was, notwithstanding this state of things, an actual authority in point of fact. But the evidence conclusively shews, that there was no such authority. It is said, that, when this married pair lived, four or five years before the beginning of the dealings between the wife and the Plaintiffs (much more than that time before this particular debt was contracted), at *Westward-Ho* in *Devonshire*, there were some other people who did give credit to the husband, the wife then acting as his agent. That the Plaintiff ever heard of that is not so much as suggested. More than four years before any dealings with the Plaintiff began that state of things, being disapproved of by the husband, was put an end to. The husband at that time expressly determined and revoked any authority, which he might previously have given to the wife; and he afterwards, at the time when this debt was contracted, was making her an annual allowance more than sufficient for any necessary purposes of her clothing, according to the state of their circumstances and condition in life. It is said that of that revocation the Plaintiff had no notice; but the Plaintiff had no notice of the circumstances which made the revocation necessary, he never had notice of any single fact material to the question of authority, except that she was a married woman.

It was argued that, because these articles were found to be in some sense "necessaries" in their nature, the husband ought therefore to be bound. But, even if the husband and wife had been living apart, the husband would not be bound by reason of such things being necessaries if he made a reasonable allowance to his wife and duly paid it: much less can he be bound in a case like this where they were not living apart, and when he made her an

allowance sufficient to cover all proper expenditure for her own and her children's clothing.

These observations dispose of the whole case; but I must add, without going into the authorities, that if the principles which run through them from first to last are regarded (as they ought to be) rather than casual *dicta* coloured (as they necessarily must be) by the circumstances of particular cases, the whole of those authorities are really consistent with each other, and with the decision which was arrived at by the majority of the Court of Common Pleas in the case of *Jolly* v. *Rees* (1).

Therefore, my Lords, I move your Lordships that this appeal be dismissed, and the judgment of the Court below affirmed.

LORD BLACKBURN:—

My Lords, if it were not that this case is precisely identical with the case of *Jolly* v. *Rees* (1), I should think it desirable to speak more at length than I propose now to do. The opinion upon which I advise your Lordships to act is that the Judges forming the majority of the Court in that case were right in the judgment which they gave; and it is admitted that that governs the present case. I also think that the judgment which my brother *Byles* gave upon that occasion (which it is admitted might, if it were good, apply to the present case) was not correct as applied to that case, and is not applicable now.

I premise, as did the majority of the Court in *Jolly* v. *Rees* (1), by saying that no question arises here as to what would be the case if the wife had been left destitute, and had not been allowed what was proper for her estate and condition. If there had been desertion and cruelty, so that she had not been supplied with what was proper, no question arises here as to whether she would not have had authority to pledge her husband's credit to get such things. That is not the case here at all. This is simply a case where a husband is living with his wife, though they are not keeping up any household establishment; and he in fact makes her an allowance which both husband and wife seemed to think, so far as one can judge from appearances, would be sufficient to enable her to supply herself with all necessary clothes. She did

(1) 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177.

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get clothes, and there was evidence which satisfied the jury that the husband really and truly told her that she was not to pledge his credit, and that she had assented.

The question comes to be, first, had she, from her position as wife, authority to pledge her husband's credit, although the husband had revoked that authority? I grant that the fact of a man living with his wife, frequently, and indeed always, does afford evidence that he entrusts her with such authorities as are commonly and ordinarily given by husband to wife. I should say that it might be a matter of doubt whether it is so perfectly certain that the articles supplied by milliners are always to be procured upon the credit of the husband, so as to make that a *primâ facie* part of the authority. But I will assume that it would be so. In the ordinary case of the management of a household the wife is the manager of the household, and would necessarily get short and reasonable credit on butcher's and baker's bills and such things; and for those she would have authority to pledge the credit of the husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then, I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this: Had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her to pledge his credit, and had given her money to buy clothes? I think, for the reasons given by the majority of the Court in *Jolly* v. *Rees* (1), and also by the Judges in the Court of Appeal in this case, that there is no authority and no principle for saying that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesmen to suppose that he himself had sanctioned the transactions, by paying them or in other ways, it might very well be argued that he would have given such evidence of authority that if he did revoke it, he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority and sanction. That would be the general rule, for where an agent is clothed with

(1) 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177.

an authority, and afterwards that authority is revoked, unless that revocation has been made known to those who have dealt with him, they would be entitled to say, "The principal is precluded from denying that that authority continued to exist, which he had led us to believe, as reasonable people, did formerly exist." Now there may be many cases in which the husband has so sanctioned his wife's pledging his credit, but there is not any such case here. The case in *Ireland* to which we have been referred, seems, as far as I could see by a slight glance, to be a case where the husband had assented to the contracts in such a way that he could not deny them afterwards. With that we have nothing at present to do. But I cannot agree with my brother *Byles* that there is any authority established by the cases that the fact that a wife is living with a husband, alone entitles the tradesmen to presume that the husband has given an authority so as to preclude the husband from denying it. I think that when husband and wife are living together, it is open to the husband to prove, if he can, the fact that the authority does not exist, it being a question for the jury whether a *bonâ fide* authority did or did not exist. This is not a case of withdrawing authority once given. The question is whether the Plaintiffs who had never dealt with the husband before were entitled to assume that there was such an authority to the wife implied in the mere fact that the wife was living with her husband; and I think the law is not so.

LORD WATSON:—

My Lords, in this case I shall content myself with saying that, notwithstanding the able and ingenious argument of the learned counsel for the Appellants, I am very clearly of opinion that both upon principle, and according to the authorities, the case of *Jolly* v. *Rees* (1) was well decided; and I therefore concur in the judgment which your Lordships propose.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 27th November, 1880.

Solicitors for Appellant: *Boyce & Ridley.*
Solicitors for Respondents: *Button, Grove, & Co.*

(1) 15 C. B. (N. S.) 628; 33 L. J. (C. P.) 177.

[HOUSE OF LORDS.]

H. L. (E.) ROBERT H. DAHL (TRADING AS DAHL & Co.) APPELLANT;

1880

AND

Nov. 16, 17, 23, 24. NELSON, DONKIN, AND OTHERS . . . RESPONDENTS.

1881

Jan. 13.

Ship—Charterer's Duties—Docks—Delay in discharging—Demurrage.

A charterparty for a ship to sail to "*London Surrey Commercial Docks*" is not satisfied by the ship arriving at the gate of the docks but not entering into the docks.

There is no established custom in the port of *London* by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to enter into the docks.

The charterparty was to "*London Surrey Commercial Docks*, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material.

The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the *Deptford Buoys* (the nearest place to the *Surrey Commercial Docks* where it could lie in safety afloat) and there discharged the cargo by lighters, carrying the timber into the *Surrey Commercial Docks*, where it was afterwards sorted and put in order on the wharf:—

Held, that under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading.

The contract in the charterparty as to demurrage was this: The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days demurrage over and above the said laying days" [there were no laying days mentioned in the charterparty] "at £30 per day payable day by day, it being agreed that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge and lien on the said cargo . . ." "The cargo to be brought to and taken from alongside the ship at merchants' risk and expense."

The ship did not fulfil the engagement in the charterparty to proceed to the *Surrey Commercial Docks* by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner was not bound to wait for an unreason-

able period, until the dock authorities should be able to assign the ship a discharging berth in the docks.

When that difficulty arose about the ship being admitted into the *Surrey Commercial Docks*, and the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, and delivery charges:—

Held, that he was warranted in so doing.

APPEAL against a decision of the Court of Appeal, in an action for demurrage and landing charges, in respect of the ship *Euxine*.

The Appellant was a timber merchant in *London*. The Respondents were shipowners at *Newcastle*. The Appellant had on the 21st of June, 1877, entered into a charterparty with the Respondents in respect of their steamship *Euxine*, which was to proceed to *Soderhamn*, and there load a cargo of deal timber. The charterparty stipulated that the *Euxine* "being so loaded shall therewith proceed to *London Surrey Commercial Docks*, or so near thereunto as she may safely get, and lie always afloat, and deliver the same on being paid freight." The charterparty contained the following stipulations: "The freight to be paid on unloading and right delivery of the cargo. . . ." "The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above . . . And ten days on demurrage over and above the said laying days" [there was no statement as to the number of laying days] "at £30 per day, payable day by day, it being agreed upon that for the payment of all freight, dead freight, and demurrage the owner shall have absolute charge and lien on the said cargo. The cargo to be brought to, and taken from, alongside the ship at merchants' risk and expense . . . If ordered to *London* the steamer to discharge in one of the docks in the River *Thames*, the freighter to pay two-thirds of the dues."

The cargo was received on board at *Soderhamn* between the 21st and 28th of July, 1877, and the *Euxine* reached the port of *London* on the 4th of August, 1877, and on the same day proceeded to the *Surrey Commercial Docks*. It did not obtain entrance there, the docks being at that time quite full. The Appellant

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had on the 16th of July, 1877, obtained, signed, and sent into the dock authorities the usual form of order required by them to authorize the ship to enter the docks, but the dock manager declined to receive the order on the ground that the docks were not only then completely full, but that for some time to come they would be so, and no berth could be assigned to the *Euxine*. The Appellant made another attempt, but in vain, to obtain the entry of the ship under the order. It was well known that, from the superior skill possessed by the persons employed at the *Surrey Commercial Docks* in unloading and classifying timber, a cargo of timber there discharged acquired a higher value in the market. On the 4th of August the *Euxine* arrived at the entrance of the docks; it was refused admission. The Respondents then required the Appellant to name another dock for the discharge of the cargo, but he declined to do so. The master then took the *Euxine* to the *Deptford Buoys*, the nearest place to the docks where the vessel could lie in safety afloat, and thence, by lighters, he effected the discharge of the cargo. The lighters carried the timber into the *Surrey Commercial Docks*, the last lighter going in on the 31st of August, 1877, but the whole of the timber was not landed on the wharf till the 28th of October, 1877. The Respondents served notices under the *Merchant Shipping Act*, 1862, on the Appellant that the timber was there deposited, and also on the dock authorities that it was so deposited, subject to lien for freight, charges, and demurrage. The Appellant deposited £2000 with the dock company to meet these claims, and then received the timber.

An action was brought by the Respondents on these claims for demurrage and charges upon the ground that the Appellant, as charterer of the vessel, was bound to provide for the entry of the vessel into the docks, and was therefore liable for the delay which had occurred. The Appellant denied his liability, and made a counter-claim for damages on account of the stop put on the delivery of the cargo, by the service on the dock company of the claim for lien for freight, charges, and demurrage; and also for alleged injury to the timber by reason of the unfitness of the lighters employed. The Master of the Rolls (before whom the case was tried, without a jury) decided that the alleged custom which bound the charterer to secure the admission of the vessel

into the docks was not proved, and that the obligation to provide a berth lay equally on both parties, that as the ship had "not gone inside the dock gates," the voyage had not been completed within the terms of the charterparty. His Lordship therefore ordered the action to be dismissed. On appeal this decision was reversed (1).

Mr. *C. Russell*, Q.C., and Mr. *A. L. Smith* (Mr. *R. T. Reid* was with them), for the Appellant, contended that the voyage had not been completed, and that the ship was not to be treated as an arrived ship, as it had never entered the docks named in the charterparty as the place of destination. The liability of the charterer for delay in unloading had therefore never arisen, and consequently the charge for demurrage could not be sustained.

Mr. *Benjamin*, Q.C., and Mr. *Cohen*, Q.C. (Mr. *Rigby* was with them), for the Respondents, contended that the default in not entering the docks was attributable to the Appellant, who was bound by the general law, as the charterer, and by the custom of the timber trade in the port of *London*, to secure the admission of the vessel into the docks named, and if he could not obtain such admission there, he was bound to name some other docks where the vessel could be discharged, for that the shipowner was not bound to wait for an indefinite time in anticipation of the possibility of a berth in the *Surrey Commercial Docks* being procured for the discharge of the vessel. Here too the Appellant had, in fact, hindered the steamer from being admitted into the docks.

The cases cited and the arguments in detail are so fully discussed in the judgments of the noble and learned Lords as to render a more extended report of them unnecessary.

LORD BLACKBURN:—

My Lords, the question in this case is, whether the Defendants have broken the contract into which they have entered with the Plaintiffs; and the first matter to be considered is, what was that contract?

It is contained in a charterparty, dated on the 21st of June, 1877, in a printed form filled up in writing, made between the

(1) 12 Ch. D. 568.

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Plaintiffs, owners of the *Euxine* steamship, and the Defendants, by which it is agreed that the *Euxine* should proceed to a port named, and there load from the Defendants a full cargo of deals. This was done, and there is no dispute about that part of the contract. The charterparty then proceeds,—that the *Euxine* "being so loaded shall therewith proceed to *London Surrey Commercial Docks*, or so near thereto as she may safely get, and lie always afloat, and deliver the same on being paid freight" at a specified rate, certain perils mentioned always excepted. The other provisions which are material are as follows:—"The cargo to be supplied to the steamer at port of loading as fast as she can take the same on board, Sundays and legal holidays excepted, and to be received at port of discharge as fast as steamer can deliver as above. And ten days on demurrage, over and above the said laying days, at thirty pounds per day, payable day by day, it being agreed upon, that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge in lien on said cargo. The cargo to be brought to and taken from alongside the ship at merchants' risk and expense."

The *Euxine* was not delayed or hindered by any of the excepted perils, and arrived at the entrance of the *Surrey Commercial Docks*. It was refused admittance to the docks under circumstances which I shall state more fully afterwards.

The Plaintiffs tried to prove that there was a custom in *London* as regards this trade, such as to be tacitly incorporated in the written contract. In this they failed, and consequently the liabilities which the parties have by the contract taken upon themselves must depend on what is the true construction of the charterparty.

The Plaintiffs contended in the Court below that by such a charterparty as this the merchant undertakes to procure the ship admission into the docks. Neither the Master of the Rolls nor the Judges in the Court of Appeal took this view of the charterparty, and it was not much urged at your Lordships' Bar. I think it is clear that it is untenable. The legal effect of the contract, in my opinion, as far as regards the shipowner is, that he binds himself that his ship shall (unless prevented by some of the excepted perils) proceed to the discharging place agreed on in the

charterparty. That is, in this case, the *Surrey Commercial Docks* (which must, I think, mean inside the docks), with an alternative, "or so near thereto as she may safely get and lie always afloat."

The legal effect, as regards the obligation on the merchant, is, I think, that he binds himself, on the ship arriving at the place where it is to deliver, to take the cargo from alongside, and for that purpose to provide the proper appliances for taking delivery there. If, as both parties wished and expected, it got to a discharging berth within the dock, the merchant was, by himself, or the dock company as his agents, to provide proper means for landing the cargo on the quay. If the ship may not get safely farther than the entrance of the docks, and is entitled to require the merchant to take delivery in the river (which is what it is said by the Plaintiffs has happened in this case), the merchant must provide lighters or other craft to take the cargo from alongside, unless it is arranged by the parties that, instead, it should go into some other dock.

If the ship had been permitted to get into the docks and lie there, but had been unable to get to a discharging berth, the merchant might have brought lighters to it and taken delivery in the middle of the docks, whether he was bound to do so or not; I do not say, for it is not necessary to decide what would have been the rights and liabilities of the parties if the ship had been admitted inside the dock gate, as this did not, in fact, happen. I will only observe that, though in the printed form it is said "and ten days on demurrage over and above the said laying days" there are no laying days provided in this charterparty in the sense in which I understand these words, and the ten days on demurrage can only begin after the ship has been, at the place where the merchant ought to have taken delivery, long enough for the merchant to be in default for not having completed the discharge. There is no period specified in this charterparty within which the merchant has engaged that the ship shall at all events be discharged, which is what I understand by laying days. I think, therefore, that the cases (such as *Brown* v. *Johnson* (1) deciding when lay days commence, have no direct bearing on such a charterparty as this. Both parties agreed in naming the *Surrey*

(1) 10 M. & W. 331.

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Commercial Docks in the charterparty as the docks to which the steamer was to go. I can see nothing amounting to a contract either on the one side or the other to procure the ship admittance, nor has any authority been cited to the effect that such a contract is implied. If the charterparty had left it free to the merchant to select a dock, it may be well that he was bound to select one into which admittance could be procured. *Ogden* v. *Graham* (1) is an authority in favour of that position. And in *Samuel* v. *The Royal Exchange Assurance Company* (2), where the merchant directed the shipowner to proceed to the *King's Dock* at *Deptford*, and the ship arrived near the dock gates whilst there was much ice, but the merchant was not able to procure an order to admit it for some days, Lord *Tenterden* ruled that if the ship remained there waiting for an order to admit, it was an unreasonable delay, which would discharge the underwriters, but otherwise if the delay was on account of the ice. That authority seems to point the same way. I do not, however, pronounce any decision on this, as it is not the case now before the House. I only mention it to prevent it being said that what I now say would be applicable to such a case.

But where, as in this case, the dock is named from the beginning by both parties, I think the refusal of the dock authorities to let the ship inside the dock gates is the fault of neither party. They ought to have foreseen that it might happen that the dock company would, owing to the exigencies of their traffic, refuse to admit a steamer for some time; in fact, it appears from the evidence, that before the charterparty was made both parties knew that the number of timber-laden steamers was so unusually great at this time that it was very likely to happen that they would refuse for a long time. They might have made any new provision on which they could agree. If they had in terms said that, in the event of something for which neither party was responsible rendering it impossible to get into the dock at all, or without a delay so great as to render it unreasonable to wait, the shipowner would, unless excused by some of the excepted perils, bring his ship to a discharging place in *London*, as near as might be to the dock, and deliver there, and that the merchant should take the

(1) 1 B. & S. 773. (2) 8 B. & C. 119.

cargo there and pay the freight, I think they would have come to as prudent an arrangement as could well be devised. They preferred to keep unaltered the old form, "or so near thereto as she may safely get," and be bound by whatever the legal effect of that might be.

Before proceeding farther I think it convenient to see what, on the evidence, were the facts on this part of the case.

The practice of the *Surrey Commercial Docks* was to give orders for the admission of steamers to their docks to discharge there, which were, in practice generally, on the application of the charterer or his representative, made either before or after the arrival of the steamer. By giving such an order the dock company agreed to admit the steamer, and on the production of the order, after the arrival of the steamer, it was, as soon as practicable, admitted into the docks. The company, in practice, limited the number of the orders to so many steamers as they at the time thought they could accommodate with discharging berths.

On the 16th of July Messrs. *Dahl,* having probably heard by telegraph that the *Euxine* was about to start, applied for an order for the admission of the *Euxine.* The superintendent of the docks, Mr. *Ross* (who died before the trial) wrote the two following letters: "19th July, 1877. Gentlemen, Referring to the inclosed orders for the steamships *Euxine* and *Chatsworth,* I beg to inform you that, on looking over the list of *Gravesend* orders I have accepted, I fear I have rather exceeded the number of steamers for which I can safely provide accommodation during the months of July and August. Under these circumstances you may, perhaps, think it advisable in your interest to arrange for the vessels to be discharged elsewhere." "25th July, 1877. Gentlemen, I much regret to be again compelled to return the indorsed order for the '*Euxine*' (S.) from *Soderhamn,* but on going round the docks to-day I find my position is even worse than I anticipated. The quays are so loaded with goods that it will be impossible for me to afford the vessel anything like the usual steamboat despatch."

On the arrival of the *Euxine* the ship's agents applied to the dock company to take the vessel, but were refused. It appears, on the evidence, that there was plenty of room inside the dock

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for the *Euxine* to lie afloat, but that the company would not admit any steamer until there was a prospect of being able, within a reasonable time, to give it a discharging berth. The legal advisers of the Defendant thought (whether correctly or not it is not necessary to decide) that if once admitted within the dock gate, the merchants would be answerable for all subsequent delay, and the Defendant pressed Mr. *Griffin*, the secretary of the dock company, not to let the *Euxine* enter the docks until they could give her a discharging berth. The secretary, to relieve his mind, on the 7th of August sent a telegram to the superintendent in these terms: "Can you give *Euxine* immediate discharging berth? If not, on no account admit steamer into dock."

This was relied on by the Plaintiffs as proving that the Defendant hindered the steamer from entering the dock. But it is clear, from the evidence of Mr. *Griffin* (the dock secretary) that the dock authorities, in their discretion, refused to admit any steamers other than those they had already engaged for, (though there was plenty of room for them to lie without discharging,) until there was a prospect of giving it a discharging berth, and that he refused to admit the *Euxine*, on the 7th of August, because he could not then give the steamer a discharge berth, and not on account of the Defendant's request, and, on being asked the question expressly, he says that he had no prospect of being able to give a berth after a short delay, or within any reasonable time. The dock authorities, it seems to me, acted very properly and prudently in what they did, but even if they were wrong, the Defendant was not responsible for this.

Though the secretary must, at the time he gave his evidence, have known when, as it really turned out, a steamer arriving on the 7th of August could have had a discharging berth, neither side asked that question. He does say that, if it had been admitted into the dock to lie afloat, it would, in the then state of the traffic, have been five weeks before the ship could have been discharged into lighters there, from which it would seem that it would have been longer before it could have got a discharging berth, and, as demurrage was at £30 a day, it is obvious that the consequences of the delay would have been serious. I may observe that the anxious desire of the Defendant that the steamer

should not be admitted within the dock gate, when he believed (whether rightly or wrongly) that the doing so would fix him with the cost of the delay, is evidence that he believed the delay would be important.

The Plaintiffs' legal advisers wrote to the Defendant the following letter, and received the following answer:—"7th August, 1877. We are instructed to inform you that the ship *Euxine*, chartered by you, is in this port ready to discharge. The *Surrey Commercial Docks Company* have declined to allow the vessel to enter their dock, as they, we learn, intimated to you several days ago. The ship's lay-days begin to-morrow. Should she not be discharged by you with the usual despatch, you will be held answerable for demurrage. Your lighters should be alongside, as you have been already informed, by the first thing to-morrow morning. The cargo would be discharged in two or three days. This notice is given you that you may take such steps as you think right to expedite the unloading of the ship." "Re *Euxine*. 8th August, 1877. Our legal advisers tell us to say, in reply to your favour of yesterday, that:—The ship is chartered for the *Surrey Commercial Docks*, and that when the vessel is there, we will be prepared to fulfil your client's contract with us, and take delivery of the cargo. The notice given by you is one which you have no power to give, and which we are not called upon to obey. If the captain enters into a contract to go to a particular dock, he must go there, and it is no business of the receivers that the dock at the time of his arrival is full and cannot take him in. He must wait till there is room." Some attempts were made to come to an amicable settlement, which unfortunately failed, and both parties stand on their legal rights.

It is perfectly plain to my mind that the ship did not fulfil the primary engagement in the charterparty to proceed to the *Surrey Commercial Docks* by merely proceeding to the gate of that dock, but if, under the circumstances, the ship had on the 7th of August, fulfilled the alternative of proceeding "as near thereto as she may safely get," the merchant was, by his agreement, to take the cargo from alongside at his risk and expense, and there is no reason why he should not have to bear all the damage occasioned by his refusal to comply with the request contained in the letter of the

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7th of August to send lighters alongside, which, on the assumption that she had got as near thereto as she could safely get, was what he had undertaken to do.

Two questions arose on these points:—1. Whether the *Euxine* could have got into the dock without such a delay as would have been unreasonable, taking into account the nature of the transaction and the interests of both parties. That was one of fact, to be determined on the evidence. 2. Whether, supposing that fact to be found in favour of the Plaintiffs, the *Euxine* had got as near thereto as she might safely get, within the meaning of the contract. That was a question of law, depending on the construction of the written contract.

As far as regards the question of law, it is not material when or by whom the question was first raised; your Lordship having to decide it according to law. But as regards the question of fact depending on the evidence, it might be material when it was raised, for if the point had not been raised at all by the Plaintiffs it would have been possible enough that the Defendants refrained from calling farther evidence which would have altered the case.

But in fact, it appears by the shorthand writer's note that Mr. *Chitty* in his opening distinctly stated this as part of the Plaintiff's case; and it was brought to the mind of the Master of the Rolls, for he afterwards asks Mr. *Russell* what he said was the meaning of the words "as near thereunto as she may safely get." A considerable argument ensued, Mr. *Russell* contending then, as he did afterwards, that the prevention must be physical, from something endangering the safety of the ship, and that it must be permanent; and when pressed he said that though the cause of obstruction was a physical one and one which would last a year, the steamer must wait a year. The Master of the Rolls said, as I think he well might, "To suppose that two commercial men should enter into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, that that means that she is to wait outside for a year because the dock is out of repair, is to my mind absurd. (*Mr. Russell*:) If the proposition looks nonsensical, if your Lordship pleases, instead of being a year, suppose it is a month—(*The Master of the Rolls*:) I do not know that it is—

(*Mr. Russell*:) Or a fortnight." So that there was ample to call on the Defendant to produce whatever evidence he could to shew that the delay in the present case would not have been unreasonable.

The expressions of the Master of the Rolls seem to indicate that at that moment he was not inclined to look with favour on this contention of the Defendant. If such was his then opinion, he changed it, for in delivering judgment a few days afterwards he says (1): "I do not see any answer to the suggestion that the contract was to take the cargo there, and that the shipowner must wait until he could get into the dock. It makes no difference whether the cause of prevention was the dock being full of vessels, or some other accident. It might have been stress of weather, or that the vessel drew more water than there was over the silt of the dock at one time, assuming the water to flow in more at one period than at another, or it might have been an accident to the dock gates which prevented the vessel going in for a period of time longer or shorter, as the case might be. The shipowner takes the risk of accident; so does the charterer, because in this case the charterer has to wait for his cargo. There is a risk on both sides, and the risks in some cases depend very much on the nature of the vessel. In the case of a steamer, probably, the risk is larger on the side of the shipowner, but not necessarily so. There may be perishable cargoes, the value of which is very variable, as the price may depend on the speed with which they are delivered on arrival at the port of discharge. Therefore both parties to the charterparty take their chance of the vessel being able to get into the dock on arrival at the place of discharge within the usual or reasonable time."

I certainly understand from this that the Master of the Rolls thought it quite immaterial whether the incapacity to get into the dock was produced by a matter threatening the safety of the ship, or some other matter. In this the Judges of the Court of Appeal all agreed with him, and so do I. But he thought it immaterial whether the delay was long or short, if it would at some time come to an end. In this the Judges of the Court of Appeal differ from him. I think it far the most difficult ques-

(1) 12 Ch. D. at p. 573.

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tion in this cause, but I agree with the Judges of Appeal. It is to be observed that the Master of the Rolls gives no answer to his own forcible remark which I have before quoted.

Had the words in the charterparty been "as near thereto as she may get," it would have been open to a charterer to contend that the ship must get as far as it was possible, however dangerous it might be. I do not think it could have been successfully so contended, but those who originally framed this clause prevented the possibility of such a contention by inserting the word "safely." In the absence of authority, and construing the words in their ordinary sense, I think that is the only effect of the introduction of the word "safely." I think if the ship cannot get at all, it cannot get safely. And there is no authority putting any other construction upon the words. It is singular enough, considering how long this has been a common form, that there is not, as far as I can learn, anything said about its construction, either in the text-books, or in any decision in our reports, before *Shield* v. *Wilkins* (1), as late as 1850. It would seem that in practice no difficulty had been found in putting a sensible meaning on this clause so as to avoid disputes. Since 1850 there have been a few cases, all of which, I believe, were cited during the argument.

The decision in *Shield* v. *Wilkins* (1) had no bearing on this case.

In *Schilizzi* v. *Derry* (2) the ship under the charterparty was bound to proceed to *Galatz* or *Ibrail*, so or near thereto as she may safely get and load a cargo of grain. The ship having arrived at the *Sulina* mouth of the *Danube*, which is ninety miles below *Galatz*, and still farther from *Ibrail*, the master finding the water on the bar unusually low, so that he could not safely cross the bar till it rose, gave notice that he required the merchant to load his cargo there, a place where it was neither customary nor reasonable to load cargo. The decision as far as regards this point, was that, as Lord *Campbell* says (3), "the meaning of the charterparty must be that the ship is to get within the ambit of the port, though she may not reach the actual harbour. Now could it be said that the vessel, if she was obstructed in entering the *Dardanelles*, had completed her voyage to *Galatz?*"

(1) 5 Ex. 304. (2) 4 E. & B. 873. 1 Jur. N.S. 1196.
(3) 4 E. & B. at p. 886. 1 Jur. N.S. 796.

In *Metcalfe* v. *Britannia Ironworks Company* (1) it was actually contended that the shipowner, who had contracted that his ship would go to *Taganrog*, or so near thereto as she could safely get, and there deliver the cargo, was entitled to require the merchant to take delivery at *Kertch*, 300 miles from *Taganrog*, and that the ship had completed her voyage because she was obstructed in entering the sea of *Azof*, but the Court, both below and in the Court of Error, agreed with the prior decision in *Schilizzi* v. *Derry* (2). I think it plain that neither of those decisions touches the present case. Whether the language which Lord *Campbell* uses is quite the most accurate to express his idea may be doubted, but in the case at bar, it was both reasonable and customary to unload ships in that part of the river to which the *Euxine* had come, and the docks adjoining.

In *Parker* v. *Winlow* (3) and *Bastifell* v. *Lloyd* (4), where the charterparty was to proceed to a wharf in a tidal harbour (which could not be reached during the neap tides), or as near as she might safely get, it was held that the ship arriving during the low tides the master was bound to wait for the higher tides, on the ground that his contract was to go to the wharf if, in the ordinary course of navigation, it could be reached, and that the shipowner took on himself the risk of delay from the ordinary course of navigation. The delay in the case at bar was not in the ordinary course of navigation.

Hillston v. *Gibson* (5), in *Scotland*, and *Capper* v. *Wallace* (6), were cases where the ship could get to her primary destination if she discharged a part of her cargo so as to lighten her. The majority of the Court of Session thought that as the quantity of cargo which the ship would have had to discharge to enable her to lie always afloat at *Glasgow* was small, it was reasonable to do so, and she was bound to do so. Nothing in that case was decided as to the alternative. The Court of Queen's Bench in the latter case held that whether the ship might insist on the whole cargo being taken at the spot where it was necessary to lighten her as being the nearest to which she could safely get, or was bound to

(1) 2 Q. B. D. 423.
(2) 4 E. & B. 873.
(3) 7 E. & B. 942.
(4) 1 H. & C. 388.
(5) 8 Sess. Cas. 3rd Series, 463.
(6) 5 Q. B. D. 163.

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go farther, depended on whether it was reasonable under all the circumstances to lighten her to the necessary extent,—which they thought was not the case.

These are all the cases which were cited on the argument, and, as far as I know, all the cases which exist, in which anything has been said as to the construction of this clause. And I do not think any of them is an authority for putting a different meaning on the words from that which they would bear in their natural sense, which, I think, is that which I have already expressed.

But the question whether a prevention causing delay for any time however long, but which would terminate, would amount to a prevention within the meaning of the clause is, I think, a much more difficult question. There is no authority bearing directly on the construction of this clause; except *Capper* v. *Wallace* (1), and as that case was decided after the decision of the Court of Appeal in the present case, which was binding on the Court of Queen's Bench, and which it appears was cited on the argument, it may be said that it adds no weight to it. But I think that there are decisions so far analogous, that they establish the principle on which the Judges of Appeal acted, and which I think they applied rightly.

It is quite true that the words of the contract are "as she may safely get;" and nothing is said expressly about getting without unreasonable delay; but in *Moss* v. *Smith* (2), Mr. Justice *Maule*, speaking of what constitutes a total loss of a ship as against an underwriter, after stating that the shipowner must repair the ship if possible, says, "It may be physically possible to repair the ship, but at an enormous cost, and there also the loss would be total; for in matters of business, a thing is said to be impossible where it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost." "If a ship sustains such extensive damage that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost." Though the particular case was a policy of insurance, Mr. Justice *Maule* speaks generally of mercantile contracts. And on this principle it was held in

(1) 5 Q. B. D. 163. (2) 9 C. B. 94, at p. 103; 19 L. J. (C.P.) 225.

Geipel v. *Smith* (1), by the whole Court, and in *Jackson* v. *Union Marine Insurance Company* (2), by a majority in the Common Pleas, and in the same case in error (3) by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end.

I said in *Geipel* v. *Smith* (4), "Very different considerations arise where the cargo is already on board, or, as in *Hadley* v. *Clarke* (5), is already on the voyage, but while the contract still remains executory, I think time is so far of the essence of the contract, as that matter which arises to cause unavoidable but unreasonable delay, is sufficient excuse for refusing to perform it." I still think that there is a distinction between the cases, for when the shipowner has got the merchant's cargo on board, he cannot simply put an end to his contract; he must do something with the cargo. But in this case, the parties have provided for what is to be done with it. If the ship cannot get into dock, she is to go as near as she may safely get, and there deliver. It certainly seems to me that any cause which would excuse the ship from going into the dock if the contract was wholly executory, must be sufficient to excuse her, and so bring the alternative into operation when the cargo is on board. There was a dissenting minority in *Jackson* v. *Union Marine Insurance Company* (6), and some previous authorities are perhaps not quite consistent with the decision. It is no doubt competent to your Lordships to reconsider that case, and decide contrary to it. I think it was rightly decided, but I can only refer your Lordships to the judgment delivered by Baron *Bramwell* in that case, in the reasoning of which I then concurred and still concur, and to which I have nothing to add.

The only remaining question is, whether the evidence in this case is such as to lead your Lordships to concur in the finding of

(1) Law Rep. 7 Q. B. 404.
(2) Law Rep. 8 C. P. 572.
(3) Law Rep. 10 C. P. 125.
(4) Law Rep. 7 Q. B. 414.
(5) 8 T. R. 259.
(6) Law Rep. 8 C. P. 572; Ibid. 10 C. P. 125.

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fact by all the Judges in the Court of Appeal that the delay would have been in this case so great as to make it unreasonable to call on the shipowner to wait. The shipowner would, I think, be bound to go into the dock if he could do so by waiting a reasonable time, but not if he could only do so by waiting an unreasonable time. It is quite true that a question of "reasonable or unreasonable" must always be a question of more or less, and therefore of uncertainty, but that I think cannot be helped. I do not pretend to lay down any precise rule as to what is reasonable or what is not. I think the main elements to be considered are, what would be the effect on the object of the contract; and the damage to each party caused by the delay; and if the result be to lead those who have to decide the question to think (to adopt the language of the Master of the Rolls) that it is absurd to suppose that two commercial men entering into a contract to charter a steamer to go to a dock, or as near thereto as she may safely get, should mean that she was to wait outside so long, they ought to find it unreasonable.

In the present case, it was agreed in the written contract that the cargo was to be received as fast as steamer can deliver. And though I do not agree with what is suggested by Lord Justice *Cotton* (1), that this cast the duty on the merchant of discharging the vessel as quickly as if she had obtained admission to the *Surrey Commercial Docks*, it certainly shewed that both parties knew that a prompt dispatch was of great consequence to the steamer, and, £30 per day being mentioned as demurrage, it was known to each that the loss by a day's delay would be at least that sum, so as to shew that a prompt dispatch was to a great extent the object of the contract. It does not appear (at least not as far as I can find) distinctly how long it would have taken to unload the steamer into lighters in the river, nor what it would have cost the merchant, but it does appear that the steamer was willing to go into the *Millwall Dock*, and there she could have been discharged at the same cost as in the *Surrey Dock* in about the same time. The Defendant refused to assent to this, and I do not think he was bound to assent. He refused because he thought, not that the cargo would be worse, but that the value

(1) 12 Ch. D. 597.

of it would be diminished so as to make him a loser by about £120. Assuming this to be so, he required the steamer to wait for a period uncertain in its length, but certainly exceeding five weeks; and five weeks at £30 a day would represent a loss to the shipowner of more than £1000. I cannot think that reasonable.

The result is that I come to the conclusion that the judgment should be affirmed, and the appeal dismissed with costs.

Lord Blackburn.

LORD WATSON:—

My Lords, this is a case of importance, seeing it involves the construction of a clause which has long been of common occurrence in contracts of affreightment. By a charterparty, dated the 21st of June, 1877, it was *inter alia* agreed that the steamship *Euxine*, after taking on board a cargo of timber in the *Baltic*, "being so loaded shall therewith proceed to *London Surrey Commercial Docks*, or as near thereto as she may safely get, and lie always afloat, and deliver the same," &c. No lay-days proper were stipulated in the charterparty, although it was agreed that there should be ten days on demurrage, "over and above the said laying-days," the apparent inconsistency being due to the fact that the charterparty consists of a printed form, partly filled up in writing. It was provided that the cargo was to be received at the port of discharge "as fast as steamer can deliver," Sundays and legal holidays excepted, and also that it was to be brought to and taken from alongside the ship at merchant's risk and expense.

The *Euxine* reached the port of *London* with her cargo in safety; and, on the 4th of August, 1877, having been refused admittance to the *Surrey Commercial Docks* was moored at the *Deptford Buoys*, outside the dock entrance.

It appears from evidence led before the Master of the Rolls that the *Surrey Dock* is used exclusively for the purposes of the timber trade, that in it steam vessels are unloaded at discharging berths alongside the quays, and that the dock authorities do not permit any steamer to enter until there is a vacant berth to receive her. Accordingly they refused to admit the *Euxine*, not on account of there being no room for her to lie in the dock, but because the discharging berths for steamers were then full and were engaged for some time to come.

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The 5th of August was a Sunday, and the 6th a legal holiday; but on the 7th the shipowners intimated to the charterers that the *Euxine* was ready to discharge her cargo, and requested that lighters should be sent alongside for that purpose. Upon the 8th of August the charterers refused to take delivery as required, the ground of their refusal being that the *Euxine* was bound to wait at owner's risk until there was room for her to discharge in the *Surrey Commercial Docks*. At this time, as appears from the evidence, the dock authorities were unable to specify within what period they could give the *Euxine* a berth for discharge.

After the refusal of the charterers to accept delivery, the owners landed the cargo by means of lighters, and placed it in the custody of the *Surrey Docks Company*, and thereafter raised the present action against the charterers for freight, demurrage and other charges and expenses incurred by them in discharging and landing the cargo. The charterer, besides denying liability, preferred a counter-claim of damages for breach of contract.

The Master of the Rolls, on the 23rd of May, 1878, gave judgment, dismissing the action, with costs, on the charterer's undertaking to pay the freight and landing charges; but on the 8th of August, 1879, the Court of Appeal reversed that judgment, and declared "that the voyage of the *Euxine* ended and the lay-days begun to run from the time when the ship took up her position at the *Deptford Buoys*, and was ready to deliver cargo." And it was ordered that the freight and what damages they had sustained by reason of the detention of the ship and the delay and increased expense of delivery, be paid to the owners. The present appeal has been brought by the charterers against the judgment and order of the Court of Appeal.

I have made no reference to the communications which passed between the law agents of the parties subsequent to the 8th of August, because these appear to me to have no bearing upon the case as presented to the House. Various questions were argued in the Courts below, but the only issue raised between the parties in this appeal is, whether the *Euxine* on the 7th of August, 1877, had, as was found by the Court of Appeal, completed her voyage in terms of the charterparty.

It is not maintained by the Respondents, the owners of the

Euxine, that the vessel had proceeded to the *Surrey Commercial Docks*. On the contrary, their contention is, that it had become impossible—in the sense of the charterparty—for her to obtain admission to the dock, and consequently that the *Euxine* must be held to have completed her voyage whenever she reached her moorings at the *Deptford Buoys*, seeing that she was then as near to the dock as she could safely get and lie afloat. The Appellants, on the other hand, contend that by the conditions of the charterparty, the *Euxine* was bound to proceed to her primary destination, unless prevented by some permanent physical obstacle. They farther maintain that the circumstances which occasioned the exclusion of the *Euxine* did not constitute an obstacle either of a physical or of a permanent character, and that the vessel was therefore bound to wait, at owner's risk, until the obstruction was removed, and then to enter the dock for the purpose of discharge.

Both parties seemed to concede, and I think it may be taken as settled law, that when, by the terms of a charterparty, a loaded ship is destined to a particular dock, or as near thereto as she may safely get, the first of these alternatives constitutes a primary obligation; and, in order to complete her voyage, the vessel must proceed to and into the dock named, unless it has become in some sense "impossible" to do so. It is only in the case of her entrance into the dock being barred by such "impossibility" that the owners can require the charterers to take delivery of her cargo to a place outside the dock. When a vessel in the course of her voyage is stopped, by an impediment occurring at a distance from the primary place of discharge, it has been decided that she cannot be held to have got "as near thereunto as she could safely get," and therefore cannot claim to have completed the voyage in terms of the second alternative: *Schilizzi* v. *Derry* (1), also *Metcalfe* v. *Britannia Ironworks Company* (2). It was observed by Lord Chief Justice *Campbell* in *Schilizzi* v. *Derry* (1), that the meaning of these words in the charterparty "so near the port of landing as the ship may safely get," "must be that she should get within the ambit of the port, though she may not be able to enter it." In the present case it does not admit of dispute that the *Euxine*

(1) 4 E. & B. 873. (2) 2 Q. B. D. 423.

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when lying at the *Deptford Buoys* was as near to the *Surrey Commercial Docks* as she could safely get, if it be assumed that it had become within the meaning of the charterparty impossible for her to get into the dock.

The Appellants maintained that there can be no impossibility within the meaning of the contract unless the vessel is stopped by an impediment which is both physical and permanent; but I greatly doubt whether, in any fair construction of the charterparty, it is necessary that the obstruction should be of a purely physical character; and I also doubt whether there be any foundation in fact for the Appellants' contention. The exclusion of the *Euxine* from the *Surrey Docks* in August, 1877, was owing to a rule made by the statutory authorities entrusted with the administration and control of the dock. It is not suggested that the rule was in excess of their powers, or that it was not capable of being legally enforced. And I am of opinion that an order emanating from the proper authority, which, if disregarded, would lead either to the dock gates being shut against the vessel or to her being turned summarily out of the dock if she did get into it, does in reality constitute a physical obstacle.

The controversy between the parties appears to me, accordingly, to be narrowed to this issue,—whether the obstacle which the *Euxine* encountered was of such permanency as to render it impossible, within the meaning of the charterparty, for her to get into the *Surrey Commercial Docks*.

In providing alternative destinations, the charterparty does not express the condition upon which the second alternative becomes substituted for the first. It does not in terms express any distinction between the alternatives, and that the first is to be regarded as the primary destination to which the chartered vessel must, if possible, proceed, is, I apprehend, an inference based upon what is known to be the ordinary course of shipping business, and, on the presumption that both parties would, from considerations of mutual interest, have agreed to that effect if they had made it matter of express contract.

The question now before the House must also, in my opinion, be determined by some such reasonable considerations. A permanent obstacle can in no reasonable sense be held to mean an

obstacle which will remain for ever. There must in every case be some limit of time within which an obstacle ceasing to exist cannot be regarded as permanent, and beyond which a continuing obstacle ceases to be temporary. It may be very difficult to fix that limit, which will obviously vary with the circumstances of each case and the terms of the charterparty; but I do not think the same difficulty exists in regard to the principle upon which it ought to be determined. I have always understood that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a Court of Law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

My Lords, I am of opinion that the question at issue in the present appeal must be solved in that way, and that the *Euxine* cannot be held to have completed her voyage on the 7th of August, unless it be established that the delay which would have taken place before she was admitted to the *Surrey Docks* would have been so great that the parties, had they anticipated and provided against its occurrence on the 21st of June, 1877, would not, as reasonable men of business, have arranged that the vessel should wait outside the dock at owner's risk until a berth was ready for her. I adopt the view of Lord Justice *Brett* (1) that the shipowner must bring his ship to the primary destination

(1) 12 Ch. D. at p. 593.

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named in the charterparty, "unless he is prevented from getting his ship to that destination by some obstruction or disability of such a character that it cannot be overcome by the shipowner by any reasonable means, except within such a time as, having regard to the adventure of both the shipowner and the charterer, is, as a matter of business, wholly unreasonable."

None of the authorities cited in the course of the argument, with the exception of two which I shall shortly notice, appears to me to have any material bearing upon the question before the House.

Most of these authorities related to the question whether, had she been permitted to enter the dock, the *Euxine* would have completed her voyage, and would have been at the charterer's risk as soon as she was moored there, or not until she reached a discharging berth alongside the quay. There being no proper lay-days stipulated in her charterparty, it might in that event have been plausibly contended that the *Euxine* fell within the principle of decision in *Burmester* v. *Hodgson* (1), and not within the rule established in *Randall* v. *Lynch* (2). But it does not appear to me to be necessary to decide the point, because the *Euxine* never did get into dock; and I do not think that its decision one way or another would be of any assistance in determining whether it was impossible for her to get there.

The cases of *Parker* v. *Winlow* (3) and *Bastifell* v. *Lloyd* (4) come somewhat nearer to the present, although their bearing upon it is not very direct. It was there held that the shipowner, having contracted in the knowledge, or at least with the means of knowing, that the primary place of discharge specified in the charterparty was a tidal port, was bound to take the risk of the tides being unfavourable when his vessel arrived, and to complete the voyage by proceeding to that place at spring-tides. It appears to me to be a reasonable inference from these decisions that no impediment arising in the ordinary course of navigation to a particular port or dock, or arising in the usual and ordinary course of management of a particular port or dock, and not lasting beyond ten days or a fortnight, is to be regarded as a permanent obstruc-

(1) 2 Camp. 488.
(2) Ibid. 352.
(3) 7 E. & B. 942.
(4) 1 H. & C. 388.

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tion, but that the ship must wait and proceed to its primary destination before the charterer can be required to take delivery of the cargo. But I do not think that much aid can be derived from these decisions in determining what shall be held to constitute a permanent obstacle in a case like the present.

In *Geipel* v. *Smith* (1), and *Jackson* v. *Union Marine Insurance Company* (2), certain points were decided in regard to the effect of unreasonable delay arising from causes not imputable to any of the parties, and so far, these cases appear to me to have a very close analogy to the present. In each of these cases there had been an impediment in the way of the chartered vessel, in consequence of which she did not go to her port of loading. That impediment, which arose in the first case from a blockade, and in the second from shipwreck, was temporary in this sense, that it would have been quite possible for the one vessel to have proceeded to the place of loading after the blockade was raised, and for the other after her repairs were completed. In *Geipel* v. *Smith* (1) the charterer raised an action of damages for breach of contract against the shipowner; but the Court of Queen's Bench, being satisfied of the fact that the ship could not have reached her destination within a reasonable time without running the blockade, held in law that the contract of the charterparty was thereby discharged. In *Jackson* v. *Union Marine Insurance Company* (2) the shipowner preferred a claim for lost freight against the underwriters, who resisted it on the ground that the charterparty remained in force notwithstanding the mishap which had befallen the ship, and that the Plaintiff was entitled to demand either specific implement or damages from the charterer. At the trial of the cause, the jury, in answer to questions put to them by the presiding Judge, found that the time necessary for repairing the ship, so as to make her a cargo-carrying ship, was so long as to make it unreasonable for the charterers to supply the agreed on cargo at the end of such time; and also that the time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the charterers. A verdict was entered for the Defendants, leave being reserved to Plaintiff; and the case was thereafter argued on a rule before the Court of

(1) Law Rep. 7 Q. B. 404. (2) Law Rep. 8 C. P. 572; Ibid. 10 C. P. 125.

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Common Pleas, under an agreement that the Defendants should be at liberty to argue that the findings of the jury were against the weight of evidence. The majority of the Common Pleas took substantially the same view of the facts as the jury had done, and held that the delay occasioned by the getting off and repair of the ship was so unreasonable as to terminate the adventure, and that the Plaintiff was accordingly entitled to recover under his policy on freight. And, upon appeal, the Court of Exchequer Chamber, with a single dissentient voice, affirmed the judgment. It was precisely the same question which arose for decision in these two cases; and, if I understand them aright, it was in both decided that this delay in loading a cargo would have been so unreasonable, so inconsistent with the presumable views and intentions of both the contracting parties, that the charterparty could no longer be held binding on either of them. No doubt in these cases the contract had not passed the executory stage; but seeing that unreasonable delay in reaching the place of loading, when occasioned by no fault of either of the parties, is effectual to discharge such a contract altogether; I conceive that, *à fortiori*, a similar delay in reaching the primary place of discharge ought to have the effect of enabling the vessel to complete her voyage by proceeding to the alternative destination.

That leaves only the question of fact, whether the state of the *Surrey Commercial Docks*, in August, 1877, was such as would have unreasonably delayed the discharge of the *Euxine* within that dock. Had I been called upon to decide that question in the first instance, I should have had great difficulty in coming to any conclusion satisfactory to my own mind. I agree that the question is sufficiently raised by the pleadings, and that it was in view of the parties, and was actually discussed in the course of the argument, which is interwoven with the evidence in this case, although it is not noticed in the judgment of the Master of the Rolls. But I cannot resist the impression that, in their anxiety to prove or disprove the alleged custom of the port, which has now been eliminated from the case, the parties have omitted to direct their evidence to many points upon which it would have been, in my opinion, desirable that a Judge, unacquainted with the port of *London*, should receive information. In the absence

of such information, I have done my best to sift the evidence, and the result is that I am not disposed to differ from the Court of Appeal. I think it may be taken as proved, that the block occasioned by the great demand for steam-ship berthage in August and September, 1877, although that was rapidly becoming the normal condition of the *Surrey Docks* in the preceding months of June and July, was due not to ordinary but to exceptional causes. And seeing that, on the 4th of August, the authorities could not undertake, within a month, or any other given time, to admit the *Euxine* into the dock, and that even on the 23rd of August they were not in a position to give a more definite or satisfactory undertaking, it appears to me to be safe to conclude that the length of time for which the *Euxine* must have waited in the port of *London*, in order to discharge in the *Surrey Docks*, would have been in excess of any delay which either the shipowner or the charterer, at the time of entering into the charterparty, could reasonably have contemplated.

I am therefore of opinion that the judgment of the Court of Appeal ought to be affirmed.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, having had an opportunity of seeing in print the opinions which have just been delivered by my two noble and learned friends who have addressed the House, and entirely agreeing with them, I think it unnecessary to add anything more.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 13th *January*, 1881.

Solicitors for Appellant: *Plews, Irvine, & Hodges.*
Solicitors for Respondent: *Druce, Sons, & Jackson.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1881 Jan. 13.

CASSELS . . . . . APPELLANT;

STEWART . . . . . RESPONDENT.

Partnership—Assignation by one Partner of his whole Interest to another.

A prosperous company came to consist of three partners, *A.*, *B.*, and *C.*, having equal shares. The contract of co-partnership contained, *inter alia*, a clause that it should not be in the power of any of the partners to assign all or any part of their shares or interest in the capital, stock, or profits of the concern to any person or persons, or give them a right to inspect the company's books, or to interfere in any way with the business; and should any such assignation be granted the same was declared of no effect so far as regards the company. There was also a clause that on the retirement of a partner the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. *A.* entered into an agreement by which he sold to *B.* his whole interest. *A.'s* name remained on the books, and he signed all deeds relating to the business till his death seven years after. *C.* was not till then informed of the agreement. He then claimed to participate on the grounds of (1) an alleged mandate to *B.* to purchase for the company *A.'s* interest; (2) that the agreement could only be legally made under the contract of co-partnership with his consent; and (3) that *B.* had secretly acquired a benefit for himself within the scope of the partnership business:—

Held, affirming the decision of the Court below, that in point of fact no agreement had been made between *B.* and *C.* to the effect that *B.* was to buy *A.'s* interest for the partnership. And in respect to the articles of co-partnership, they did not prevent the agreement being made, and otherwise it was perfectly legal. Therefore *C.* was not entitled to any benefit under it.

APPEAL against a decision of the Second Division of the Court of Session.

In 1845 the *Glasgow Iron Company* was constituted by contract of co-partnership to endure for seven years, with a break at the end of five in favour of any of the partners. The second article, *inter alia*, provided that "it shall not be in the power of any of the partners to assign all or any part of his share or interest in the capital, stock, or profits of the concern to any person or persons, or to give them a right to inspect the company's books, or to interfere in any way with the business of the company; and

should any such assignation or other conveyance be granted or right given contrary to this stipulation, the same is hereby declared to be null and void, and of no force, strength, or effect, so far as regards the company or other individual partners, who shall not be obliged to pay any attention thereto."

The seventh article was as follows:—"And in like manner in the event of any of the partners retiring from the concern as hereinbefore provided or becoming insolvent, the remaining or solvent partners or partner shall have power to assume such other person or persons into the room and place of such retiring or insolvent partner or partners, and the remaining or solvent partner and partners shall nevertheless have the same option of retaining the company's stocks, debts, property, assets, and effects, upon granting bills to the retiring partner or partners, or to wind up the concern in manner, and subject to the same conditions terms, and declarations as is provided in the case of a deceasing partner."

The original partners were the late *James Reid*, *James Reid Stewart*, his nephew and Respondent, *Robert Cassels*, the Appellant, and *Noah Meese*.

In 1847 *James Henderson Robertson* was assumed as a partner by minute of agreement.

In 1850 *Noah Meese* retired, and his interest was taken over by the company and divided between the remaining partners.

In 1852 the Appellant acquired one of Mr. *Reid's* shares by an arrangement ratified by the company by minute dated 1858.

In 1860 Mr. *Robertson* retired as at the 31st of May, 1859, and his interest was taken over by the three surviving partners, in terms of article 7 of the contract of partnership. The interest of the different partners in the concern had been altered from time to time. On the occasion of Mr. *Robertson's* retirement a minute of agreement was prepared, dated the 31st of May, 1860, but not signed till March, 1864, that the three remaining partners, *Reid*, *Stewart*, and *Cassels*, should each have an equal share in the company's business from the date of Mr. *Robertson's* retirement.

The circumstances out of which this action arose are as follows:—On the 19th of May, 1863, a private agreement was executed between *Reid* and *Stewart*, whereby, on the terms and conditions

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therein specified, *Reid* agreed to sell and sold to the Respondent his whole right and interest in the company as the said right and interest stood on the 31st of May, 1859. By the 1st article the price was fixed at £62,400, being the amount standing at *Reid's* credit in the books of the concern as at the date the 31st of May, 1859, to be paid with interest within twenty years from the date of the agreement. By the 2nd article the Respondent was to be entitled to the whole profits that had accrued upon *Reid's* right and interest in the concern from the 31st of May, 1859, and that might accrue thereafter on the same. By the 3rd and 4th articles it was provided that the interest of the price from May, 1859, to March, 1863, amounting to £13,993 2*s.* 9*d.*, should be paid to *Reid* at that term, and that the interest after that term, at the rate of 4 per cent., should be paid to him half-yearly. The 7th article was in the following terms:—"The right and interest or stock hereby sold may remain in the first party's (*Reid's*) name, or it may be transferred over to the second party at any time he may require it."

Mr. *Reid's* name remained on the books of the company down to his death in 1870, and he continued as before to be a party to deeds and various other transactions relating to the partnership. The firm was very prosperous, and had assumed, previous to 1870, very large proportions.

The agreement was not intimated to the Appellant, but after *Reid's* death it came to his knowledge; and he ultimately raised this action, concluding for declarator that the agreement dated the 19th of May, 1863, entered into by the Respondent with the deceased *James Reid*, for the purchase of the said *James Reid's* whole right and interest, as at the 31st of May, 1859, in the company's concern carried on in *Glasgow* under the name of the *Glasgow Iron Company*, was made and entered into by the Respondent for and on behalf of the said *Glasgow Iron Company*, and the Appellant and Respondent as the whole remaining partners thereof, or must be held to have been so made and entered into; and further that the partnership accounts of the company from the 31st of May, 1859, to the 31st of May, 1870, should be made up and settled on the footing that the said purchase was made for behoof of the said company, and the Appellant and Respondent

equally as the whole remanent partners thereof. The material averments of the Appellant were as follows:

(Cond. 11.) The negotiations with Mr. *Robertson*, which ended in his retiral, were conducted by the Pursuer (Appellant). Although ratifying what had been agreed to by the Pursuer, Mr. *Reid* objected to the terms granted to Mr. *Robertson* as being too favourable to him. The Defender (Respondent) subsequently reported to the Pursuer that Mr. *Reid* was willing to make over his interest in the business to the company on similar terms, and he was thereupon authorized by the Pursuer to negotiate for a purchase of Mr. *Reid's* interest in the business for the company on these terms. Nothing further was heard by the Pursuer about the matter till after Mr. *Reid's* death in 1870, when the Pursuer discovered that the Defender had purchased Mr. *Reid's* interest in his own name on lower terms than those which the Pursuer empowered him to give on behalf of the company.

(Cond. 12.) By the said agreement Mr. *Reid* transferred his share in the said company to the Defender. It made the partners two, in place of three. It in reality gave the Defender the practical control of the business by means of his command of Mr. *Reid's* vote. It deprived the Pursuer of Mr. *Reid's* advice as a party interested in the same way as before in the business. It prevented him exercising the right of purchase of Mr. *Reid's* share, which he had in the event of Mr. *Reid's* death under the then existing terms of the copartnery.

(Cond. 13.) The Defender did not ask the Pursuer's consent to said purchase, nor after it was made did he communicate the same to the Pursuer as he was bound to do. On the contrary, for the Defender's own purposes and to the Pursuer's prejudice, and with the object of deceiving the Pursuer, he continued with the late Mr. *Reid* fraudulently to conceal the transaction from the Pursuer, and to lead him to believe that Mr. *Reid* continued to be a partner and to be in the same position as before in all respects.

(Cond. 14.) In particular, in pursuance of said fraudulent schemes, and without any communication being made to the Pursuer as to the said purchase, and subsequent to the agreement in 1863, the following devices for concealing the true state of matters were resorted to by the Defender:—The Defender and Mr. *Reid* still signed along with the Pursuer deeds necessary for carrying out purchases, leases, and various other transactions entered into in name of the said firm from time to time. These conveyances, leases, and other deeds were, with the knowledge and approval of the Defender and Mr. *Reid*, taken in favour of Mr. *Reid*, the Pursuer, and Defender, as partners of the said firm, in similar terms to those in which they were taken prior to 1863. The Pursuer had always great difficulty in getting the balance-sheets of the company signed, and they often lay over for a long time subsequent to their date. On the 19th of May, 1863, the balance-sheet of the 31st of May, 1859, had not been signed. In March, 1864, it was signed by Mr. *Reid*, the Defender, and Pursuer. At the same time the balance-sheets as at the 31st of May, 1860, 1861, 1862, and 1863, were signed, and also the minute dated the 31st of May, 1860, which in part relates to Mr. *Robertson's* retiral. The balance-sheet at the 31st of May, 1864, was signed by Mr. *Reid*, the Defender, and the Pursuer in December, 1866. The dockets to these balance-sheets were all in the following or similar terms, viz:—"We, the undersigned remaining partners of the *Glasgow Ironworks Company*, hereby agree that the above balance represents a correct statement of the company's affairs and our

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respective interests at the above date, signed, *James Reid, James R. Stewart, Robt. Cassels.*" No subsequent balances have been signed. They have from time to time been made up by the Pursuer. Those till 1870 were made up on the footing that Mr. *Reid* continued a partner as before, and they were sent to the Defender and to Mr. *Reid* up till the time of his death. By these and other fraudulent misrepresentations and concealments the Pursuer was induced to believe, and did believe, that Mr. *Reid* remained a partner of the said firm up to the date of his death on the same terms as before, and that there had been no change in the position of the other partners and himself.

The pleas in law for the Appellant were:

(1.) The Pursuer is entitled to decree as concluded for—(1.) In respect the Defender agreed with the Pursuer to endeavour to purchase Mr. *Reid's* interest on behalf of the *Glasgow Iron Company*, and thereafter succeeded in purchasing the same. (2.) In respect the Defender, as a partner of the said company, was not entitled to purchase, without the Pursuer's consent, Mr. *Reid's* interest for himself, or otherwise than on behalf of the said company.

The Respondent alleged that the agreement was part of his uncle's testamentary arrangements, and there was no doubt an immediate benefit was by the agreement conferred on the Respondent, because at its date there was a sum of accrued profits of at least £25,000 at the credit of *Reid* over and above the price of £62,000.

He stated in his answers, *inter alia*, as follows:

(Ans. 12.) Explain that the agreement did not and was not intended to affect Mr. *Reid's* position as a partner of the company, or the rights and obligations existing, as between him on the one hand and the Pursuer on the other. In point of fact, Mr. *Reid* continued a partner till his death and took as much interest in the concern after the date of the agreement as before.

(Ans. 13.) Admitted that the Defender did not ask the Pursuer's consent to the said agreement, nor did he communicate the same to the Pursuer. Explained that the Defender was Mr. *Reid's* only nephew, and that the agreement was prepared without his solicitation and knowledge by the late Mr. *Towers-Clark*, Mr. *Reid's* agent, in connection with Mr. *Reid's* testamentary arrangements, and was submitted in draft to the Defender, who accepted and executed it in conformity with his uncle's wishes.

His pleas in law were:

(2.) The averments of the Pursuer being, so far as material, unfounded in fact, the Defender is entitled to absolvitor.

(3.) The agreement in question having been lawfully entered into by the Defender for his own behoof, the Pursuer has no interest in or right to claim the benefit of the same.

The Lord Ordinary (1), 27th of November, 1878, pronounced

(1) Lord *Curriehill*.

an interlocutor by which he sustained the defences; and assoilzied the Defender from the whole conclusions of the action.

The Appellant reclaimed; but the Second Division, 22nd of May, 1879, adhered to the Lord Ordinary's interlocutor, and refused the reclaiming note (1).

On appeal,

Sir *F. Herschell*, S.G., *J. B. Balfour*, S.G. (*Scotland*) (with them Mr. *Rigby*), contended for the Appellant that he had authorized the Respondent in 1859, and that the Respondent had accepted of the authority to negotiate for the purchase of *Reid's* share for the joint behoof of the remaining partners, and therefore he must be held to have purchased it for the purposes of that mandate; and, at all events, the fact of the agreement referring back to that year was suspicious. But if held that there was no mandate, then, secondly, the agreement was entered into under such circumstances as to entitle the Appellant to participate in it. For it could not be legally entered into without the Appellant's consent. The contract of co-partnership contained an absolute prohibition against partners assigning their interest; and the acquisition of shares of outgoing partners, as shewn by documents and previous acting of the company, was one of the objects of the company. Apart from the express terms of the contract, the secret agreement by which the Respondent acquired for himself alone a benefit falling within the scope of the partnership business, was a breach of the good faith of the partnership, and when such a benefit was acquired each partner had a right to demand that it should be communicated to the whole of them equally. This was not a case of sub-partnership, for *Reid* ceased to have the slightest personal right or interest, and became at best a mere trustee bound to follow the Respondent's instructions. And the illegality of such an arrangement was demonstrated by the fact that, the Appellant believing *Reid* still in the business, was induced to carry it on in that belief, and, consequently, for the benefit of two-thirds to the Respondent. Past profits might be assigned; but here every right, benefit, and interest of every kind was given up, and the company was deprived of that which the contract of

(1) Court of Sess. Cas. 4th Series, vol. vi. p. 936.

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co-partnery made essential—*Reid's* personal interest, utmost skill, and attention.

On general principles it was inequitable, having regard to the fiduciary relations due to each other, that such an agreement should be made behind the back of another partner. If the Appellant had been informed in 1863 of the agreement he would have claimed half the benefit, or else—the term of the co-partnership having expired—would have dissolved the partnership, and started another business. He could not be prejudiced by the relationship between *Reid* and the Respondent, and the deed in its terms did not seem to confer a special favour, and was not a testamentary arrangement, but an *inter vivos de presenti* contract of sale.

The appropriate remedy now was that the agreement should be held to be good only in the way that it could legally be made, and that was by giving the Appellant a benefit in it.

[They cited *Featherstonhaugh* v. *Fenwick* (1); *Bluck* v. *Capstick* (2); *Carter* v. *Horne* (3).]

Mr. *E. E. Kay*, Q.C., and Mr. *Mackintosh* (of the Scotch Bar), appeared for the Respondent, but were not called upon.

The Law Peers delivered judgment as follows:—

LORD SELBORNE, L.C.:—

This case has been argued with much ability, and your Lordships have been put in possession of the views which are relied upon in support of the appeal. Those views were not adopted by any of the four learned Judges who decided the case in the Court below; and under these circumstances, as I believe there is no difference of opinion among your Lordships with regard to the correctness of the decision appealed from, it does not appear to be necessary to call upon the learned counsel for the Respondent to address your Lordships' House.

Now, the first point, which was very confidently urged, was that in point of fact there was a mandate constituting the Respondent,

(1) 17 Ves. 298. (2) 12 Ch. D. 863.
(3) 1 Eq. C. Ab. 7.

Mr. *Stewart*, the agent of his co-partner, the Appellant, in this transaction, so as, upon the principles of mandate or agency, to entitle the Appellant to the benefit of the contract made between Mr. *Stewart* and his uncle Mr. *Reid*. It would be very difficult to imagine an allegation of that kind resting upon more slender grounds, because the way in which it is put by the Appellant himself is this: that in the year 1860, three years before the agreement between Mr. *Reid* and Mr. *Stewart*, upon the occasion of Mr. *Robertson* parting with his interest on certain terms which were thought to be beneficial to him, something was said about Mr. *Reid* being probably willing to part with his interest on similar terms, and Mr. *Cassels*, the Appellant, said that he would be perfectly agreeable to such an arrangement. Upon the question of fact, whether any conversation which could reasonably be so interpreted ever took place or not, there is a difference of recollection between the Appellant and the Respondent. Your Lordships have one witness against the other, and nothing that I can see to strike the balance between them. Therefore there would have been great difficulty, to say the least, in acting upon that evidence, more especially when the language to which alone Mr. *Cassels* speaks is itself the most vague and uncertain which could well be conceived on such a subject. That Mr. *Stewart* did not consider that he had accepted any mandate for that purpose is clear.

But it seems to me that we may lay the whole of that branch of the argument aside upon this ground: that whatever controversy might have arisen in consequence of that conversation between these parties, assuming the conversation to have taken place as Mr. *Cassels* states, if then or shortly afterwards such an agreement had been made, in point of fact no such agreement was made then or within anything which by possibility could be called a reasonable time afterwards. There is no connection in point of fact between the actual agreement and that conversation. I pass, therefore, from the subject of mandate.

The next argument was this, that a wrong has been done here by the purchase of Mr. *Reid's* share from him by his nephew, Mr. *Stewart*, on all or some of these three grounds: first, that there is in the partnership contract a prohibition against the

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assignment of a partner's share, and that the breach of that prohibition, which it is said has taken place by this transaction, is a wrong for which there must be some remedy; secondly, that even if that were no wrong, or a wrong not drawing after it the remedy now claimed in the case of a sale of Mr. *Reid's* interest to a stranger, yet the position of Mr. *Stewart*, as a partner, disqualified him at all events from purchasing otherwise than for the benefit of his co-partner as well as himself, and that on that ground the Appellant may claim the benefit of the purchase; and, thirdly, that if these consequences would not follow from these causes alone, they do follow when you have added the concealment of the transaction for a considerable period of time.

Now, the first observation that I have to make is this, that I cannot interpret the partnership contract as prohibiting, or attempting to prohibit, a sale of the beneficial interest of one of the partners to a stranger, or to a co-partner, if the effect of such sale is not to give any "right to inspect the company's books" or "to interfere in any way with the business of the company," to a person who had it not before, or to oblige the company or other individual partners to take notice of it or "pay any attention" to it. I cannot separate, as it has been suggested that your Lordships ought to separate, that part of the clause which speaks of the effect of such assignation or conveyance, if granted, and the part which says that it shall not be in the power of any of the parties to assign. Your Lordships will observe that this is not a covenant not to do a thing, but a declaration as between the partners that it shall not be in the power of any of them to do it. Then it goes on to contemplate an act of that nature being done, and says, that if it should be done, it shall be "null and void and of no force, strength, or effect so far as regards the company," and so on. The argument on the other side really is, that you are to turn the declaration as to what is not to be in the power of the partners into a covenant not to do a thing which is in their power; and when it is expressly said that the effect of a particular act is to be qualified so far as relates to certain persons and matters, that you are to qualify it still further, and not only so far. I cannot accept that construction of the agreement. It appears to me that its intention and effect is simply this: if anything of that kind is

done, it shall not have the effect of giving any person claiming under it any right whatever against the company or against the other partners, or of obliging them to take any notice of it; it shall not have any effect which will alter any of their rights. The actual transaction was one which, as it was carried into effect, was, as I think, in exact conformity with that agreement. It gave no new person any right to inspect the company's books, or to interfere with the business; it did not enlarge the power of interference, within the meaning which I ascribe to those words in the contract, of any person, beyond what existed before; it did not change the constitution of the partnership; it did not make Mr. *Reid* cease to be liable; it did not oblige the Appellant to take notice of any greater interest in Mr. *Stewart* than Mr. *Stewart* had before.

I pass on to the next argument, arising out of the special position of Mr. *Stewart* as a partner. Upon that I say, whatever may be the force of that argument, it cannot depend upon this clause; for this clause most certainly makes no distinction between an assignment to a person who is, and an assignment to a person who is not, a partner. On the contrary, it would rather seem to me that it has in view an assignment to one who is not a partner, prohibiting things which in the other case could not happen. Well, then, is there any authority which says that the beneficial interest of one partner in a partnership, apart from a special contract or stipulation, may not be given or sold by him to another of the co-partners? The authorities which were cited have no tendency to establish such a principle. They relate to dealings by a partner, during the continuance of the partnership, with either present or future partnership assets or liabilities. A man obtaining his *locus standi*, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his co-partners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them. I should be sorry to see the day when the principle of such cases as *Featherstonehaugh* v. *Fenwick* (1) could be disturbed or called in question. But this subject-matter here is in no sense a property or interest of the partnership. The share of an indi-

(1) 17 Ves. 298.

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vidual partner is his own property, not the property of the firm; and if bought it would not be bought by the partnership as a partnership, but by one or more individuals purchasing for his or their own benefit. If the man dies, it passes to his heirs and executors, unless there is a stipulation to the contrary. If there is a stipulation to the contrary, still the principle is the same in all respects—it is his property—it is something distinct from the partnership assets, although it is, or represents, his interest in those assets. That principle, therefore, does not touch this case at all.

It is suggested that by possibility the motives of particular partners for interesting themselves in the welfare of the concern may be affected by a diminution of their beneficial interests. All I can say is, if that be the opinion of those who enter into a partnership contract, they must put something into the partnership contract to restrict the powers which otherwise each partner would have over what is his own. I am not at all sure that it would increase the inducement to enter into partnership contracts if such restrictions were made part of them; because the principle of the argument does not stop at the point where the entire beneficial interest is parted with, and a partner becomes a mere trustee for some one else to whom he has made either a gift or a sale; it would apply to every case in which he diminished his beneficial interest below the point recognised in the constitution of the partnership, either by communicating to somebody else a particular share of it, or by allowing some participation in the profits, for a certain consideration, to another person, or by making a charge upon it, or by granting or agreeing to pay an annuity or annuities out of it.

Not only is there no authority for such a proposition, but we have in the books well-known cases in which such transactions have been recognised by Courts of Equity, at least in *England*, as regular and legitimate, where not expressly excluded. There is the well-known case of *Brown* v. *De Tastet* (1). *De Tastet* and *Paiva* and *Grellet* entered into a partnership deed, and a Mr. *Mangin*, who had been at an earlier period in partnership with *De Tastet*, not communicating at all with *Paiva* or *Grellet*, made

(1) Jac. Rep. 283.

an agreement for a subpartnership with *De Tastet* in *De Tastet's* share. Afterwards the accounts, as to that share, had to be taken in a suit in Chancery, and the Court, with the approval of Lord *Eldon*, as appears by this book, dismissed the bill as against the other two partners *Paiva* and *Grellet*, because they had nothing to do with the contract; but directed an account of the profits as between *De Tastet* and *Mangin*, holding *De Tastet* responsible to *Mangin* for his share of all the profits which had been made either by himself or the other partners. There is another case upon the same principle, *Bray* v. *Fromont* (1). The agreement there was between three persons to work a coach from *London* to *Bath*, each undertaking to find horses for certain stages. One of them (*Smith*) employed *Bray* to provide horses for him, and agreed, in consideration of his doing so, to give him a certain share of his profits. The bill which was maintained was for an account and payment of a proportionate share of those profits, but subject to the account as between the partners in the principal partnership; the other partners having nothing to do with that share in which the interest was given to *Bray*.

I apprehend, my Lords, that you will, under these circumstances, hold that in this case there is no principle which justifies any claim on the part of the Appellant to participate in the profits of this transaction. I can find no ground for saying that there is any breach of the duty of a partner in a transaction like this between an uncle and a nephew, by way of bounty to a very great extent on the part of the uncle to the nephew; a transaction involving no object or purpose against the good faith of the partnership agreement, and neither alleged nor proved to have had such an effect. If that or any other bargain, made by a partner with another partner, being concealed, were used for unfair or illegitimate purposes in the subsequent management of the partnership concern, and if, when the facts became known, it should appear that wrong had been done and damage sustained by means of any such secret arrangement between two partners, redress suitable to the nature of the injury and the circumstances of the case, might probably be found. But that would depend, not upon the agreement by one partner to give a beneficial interest in

(1) 6 Madd. Rep. 5.

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his share to another, but upon the use assumed to have been made of that agreement in an illegitimate way to the prejudice of a third partner, and upon proof of actual damage having occurred.

It appears to me to be unnecessary to add anything more, except to move your Lordships that this appeal should be dismissed with costs.

LORD PENZANCE:—

My Lords, agreeing as I do with all that has fallen from my noble and learned friend the Lord Chancellor, I shall occupy your Lordships for a very few minutes with what I have to say.

With regard to the first point as to the mandate, I think it is a point which, when the facts of the case are understood, is really hardly arguable. The most that has happened, supposing that you take the Pursuer's account and throw aside the account of the Defender altogether, is that at a certain time it was intimated to the Pursuer that Mr. *Reid* wished to retire upon the same terms as Mr. *Robertson*, and thereupon the Pursuer said that he would have no objection to that arrangement. Now, my Lords, that is construed into a mandate, and then the matter is followed up by an attempt to shew that the bargain which was ultimately made between Mr. *Stewart* and Mr. *Reid* was a bargain actually made in furtherance and under the authority of that mandate.

It seems to me that the fact that the one partner intimated to the other partner that he was ready to enter into a certain arrangement with regard to the retirement of Mr. *Reid*, is not sufficient to constitute an authority in the sense in which that word is used in this argument without shewing that Mr. *Stewart*, to whom that proposition was made, accepted it as an authority, and afterwards acted upon it as an authority. Now it seems to me that there is no particle of evidence upon the face of the Pursuer's statement to shew that Mr. *Stewart* ever accepted that, or ever professed that he would act upon it, and it took place three years, if not more, before he actually entered into a contract with Mr. *Reid* for his retirement, or rather for the sale of his interest in the concern. It appears to me, therefore, that that point entirely fails, and that

it is one upon which your Lordships could have, I think, very little or no doubt.

With regard to the deed, and particularly the effect of the sixth clause of the deed, I will not add one word to the excellent exposition of it which my noble and learned friend the Lord Chancellor has given, and with which I entirely agree.

But with regard to the last point, which is a more substantial one, and one upon which greater stress was laid, namely, that the principle that a partner (and it is the same with regard to an agent) cannot in acting in partnership concerns secure to himself an individual benefit where he is acting in those concerns, and that if he attempts to do so, the partnership may claim a benefit in any such contract, is a principle well understood and thoroughly and soundly established; and, as I said before, the same principle applies in the case of an agent. But the answer to the proposed application of that principle to the present case is, that this arrangement with Mr. *Reid* was not an arrangement in the partnership business, it was not an arrangement in which the partnership had an interest. I do not know that I could better express what I feel upon that subject than by reading a sentence of the judgment of the Lord Ordinary. He says, "The present case appears to me to be entirely different. The subject-matter of the agreement is entirely outside the scope of the company's business. It relates exclusively to the stock and profit belonging to one of the individual partners, who is communicating these on extremely liberal terms to his own nephew, who no doubt happens to be also a partner in the concern, but who does not thereby acquire any advantage over the company, or the remaining partner, or make any profit which the company or the remaining partner would have made if there had been no such agreement." It seems to me, my Lords, that that correctly describes the circumstances of the present case, and by that description throws them outside the principle upon which your Lordships are now asked to act.

But then it was said that although that may be so, a distinct wrong was done in the present case to Mr. *Cassels*, the Pursuer, because by an assignment of Mr. *Reid's* interest behind his back, Mr. *Reid* had stripped himself of part, at any rate, if not of the

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whole, of those motives which would tend to make him exercise the vigilance and judgment in the partnership affairs to which Mr. *Cassels*, the Pursuer, had a right to look. My Lords, I confess that when that proposition was stated, I asked myself how far such a proposition would go. A share in a partnership and the profits made, or to be made, in the partnership, are, I believe, the property of the individual partner, and if the principle were once to be established that an individual partner cannot charge and cannot sell a portion of his interest, that he cannot hand over to a third person for valuable consideration a year's profit, or half a year's profit, or in any way diminish or withdraw a portion of the active interest he has in the concern,—I say if that principle were to be established it would be one of very wide application, and one which would largely diminish the individual interest and freedom that properly belong to a partner in any partnership. I looked anxiously to see whether, for such a principle as was put forward, any case was cited at the Bar in establishment of it. No such case, or authority of any kind, was cited, and the principle of the cases I have referred to certainly did not embrace it. My Lords, in the absence of all authority, and having regard to the effect which would be produced by accepting such a principle, I should strongly advise your Lordships that you ought not to do so.

Under these circumstances I agree that the judgment should stand, and that the appeal should be dismissed, with costs.

LORD BLACKBURN :—

I am entirely of the same opinion.

On the first question, whether there was in point of fact a mandate or authority given by Mr. *Cassels* to Mr. *Stewart* under which Mr. *Stewart* made a contract with Mr. *Reid*, it is only a question of fact, and upon that I intend to say nothing more than that having read Lord *Curriehill's* (the Lord Ordinary) note to his interlocutor, which is the first judgment given, I can add nothing whatever to his reasons stated there, which seem to me to place that part of the matter in as clear a light as possible. I do not think there is the slightest ground for saying that in point of fact that was made out.

Then as to the next ground upon which the Appellant's case

was put, namely, the supposition of an analogy to the case of *Featherstonehaugh* v. *Fenwick* (1) and other cases of that sort, I do not think that that class of cases has any analogy with the present. Those cases proceed upon the ground that a partner being an agent (for I think it is because he is an agent that the fiduciary character arises), if he, as an agent, makes a profit out of the concerns of his principal, and as acting for him, he must communicate it to his principal; he cannot make a profit out of his principal's business for himself. As I have said, a partner is an agent, and the principle applying to him is a branch of that general rule which applies to agents. I agree with what has been said by both the noble and learned Lords who have spoken before me, that that is of necessity confined to those cases where it is part of the business of the company or firm that is carried on, and I think it is quite impossible to say that the purchase of a partner's beneficial interest in the partner's share in the partnership was one of those things in which the business of the company was carried on, and in which, therefore, Mr. *Stewart* may be considered as in the nature of an agent for that class of dealings for Mr. *Cassels*. It is upon that ground that I say that the class of cases I have referred to has nothing whatever to do with the present case.

There is a further ground upon which the Appellant's case is put, namely, that by the special terms of the contract made between the partners, it is agreed that Mr. *Reid* shall continue a partner, that he shall not have the power in fact to sell his partnership interest, or at least, that if he did sell his partnership interest, that should not have any effect as against the other partners in the concern. Upon that I perfectly agree with what has been already said by the noble and learned Lord on the woolsack, and I do not think it necessary to repeat it.

The last ground, and the only one remaining to be spoken of, is this. It was said, as I understood the argument of the counsel for the Appellant, that, although this transaction might have been all right if it had been disclosed, yet that inasmuch as Mr. *Reid*, by having made this agreement with his nephew by which he in substance and effect gave him a present of some £25,000 (for that is what it really amounted to) in this particular shape,

(1) 17 Ves. 298.

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had deprived himself of the beneficial interest in his partnership whilst he still retained the liability and still retained the power, he had by so doing deceived his partner, Mr. *Cassels*, and induced him to go on in the belief that he had the benefit not only of Mr. *Reid's* services and Mr. *Reid's* judgment, but also of Mr. *Reid's* services and judgment as having a strong pecuniary interest in making them as available as he could. I think that is about the strongest way in which the argument can be put. It was said that that was a positive wrong to his partner.

Now I pause to say that I do not think it was in the slightest degree morally wrong in the present case or in circumstances like those before us. I do not see that it could be supposed for a moment by the most conscientious moralist that there was anything wrong here. But I can see this: it may have led Mr. *Cassels* to suppose that he had Mr. *Reid's* personal interest to induce Mr. *Reid* to exercise his judgment judiciously, and to be more careful in giving his judgment and advice upon a thing than he would otherwise have been. It was said that that was a wrong, and then the argument that was based upon it was this: "We cannot prove that this has done the slightest harm" (in point of fact I think it is clearly proved that it never did the slightest harm), "but it might possibly have done some harm, and therefore" (and here it is that I confess I listened to both the learned counsel with some curiosity to see how they took this great stride in their logic) "therefore, although we cannot prove that it has done any harm, yet, as it might possibly have done harm, we say that there was a breach of contract with Mr. *Cassels* in the transaction, and it must be considered as having been a mere case of a mandate to one partner on the part of the other. I cannot see, my Lords, how that conclusion would follow from the premises; and not a single authority, or anything like an authority, has been cited for it.

I can only come to the conclusion, therefore, that the contract remains a good contract between Mr. *Reid* and Mr. *Stewart* as it was before Mr. *Reid's* death. It would have been better, I think, if Mr. *Cassels* had been informed of it whilst it was so going on. I generally think it is advisable as a matter of prudence, as well as on other grounds, to let everything be above board; and there-

fore I say it would have been better that he should have been told that Mr. *Reid* had made that arrangement; but his not having been told about it did no harm whatever, and inasmuch as even supposing harm had resulted from it, Mr. *Reid* would have been liable for that harm, that cannot entitle Mr. *Cassels* to say that as against Mr. *Stewart* the benefit arising from the purchase of Mr. *Reid's* share is to be given partly to Mr. *Cassels*. I think, therefore, my Lords, that upon all these grounds the case of the Appellant totally fails, and consequently I quite agree in the proposed judgment.

LORD WATSON concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 13th Jan., 1881.

Agents for Appellant: *Young, Jones, Roberts, & Hale.*
Agents for Respondent: *Grahames, Wardlaw, & Currey.*

Considered. FUNG KAI SUN v. CHAN FUI HING [1951] A. C. 489

[HOUSE OF LORDS.]

H. L. (Sc.) 1881 Feb. 11.

M'KENZIE (PAUPER) . . . . . APPELLANT;

BRITISH LINEN COMPANY . . . . RESPONDENTS.

Bill of Exchange—Forgery—Silence—Adoption of Signature—Estoppel.

A person who knows that a bank is relying upon his forged signature to a bill, cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel.

The names of *A.* and *B.* appeared on a bill as drawers and indorsers to the *B. L. Co.* The *B. L. Co.'s Inverness* bank discounted it for *C.*, who signed it as acceptor. They had had no previous dealings with *A.* or *B.* Being dishonoured when due, notice to that effect was sent to *A.* and *B.*, and received late on a Saturday, but they did not communicate with the bank. On the following Monday, being the 14th of April, *C.* brought to the *B. L. Co.* a blank bill with *A.* and *B.'s* names as drawers and indorsers, apparently in the same handwriting as the previous bill. It was agreed to accept it as a renewal of the previous bill but for a less amount, the difference being paid in cash by *C.* Three days before it was due, notice was sent to *A.* and *B.*, and again when it was dishonoured, and then through the *B. L. Co.'s* law agent. A fortnight after the first notice the *B. L. Co.* were informed for the first time that *A.* and *B.'s* signatures were forgeries, and they declined to pay the amount in the bill. *A.* alleged that he called on *C.* on the 14th of April about the first bill, that *C.* admitted that he had forged his name, handed him the bill, and solemnly assured him that it had been taken up by cash; and so assured he did not think it necessary to communicate with the bank. He admitted that on that day he drank with *C.* and borrowed £4 of him. He denied positively any knowledge of the second bill until he received the bank notices. *C.* was convicted of the forgery. The *B. L. Co.* charged *A.* with payment of the bill on the ground that he had either authorized the use of his name, or had subsequently adopted and accredited the bill, and therefore was estopped from denying his liability:—

Held, reversing the decision of the Court below, that in the facts proved *A.* had neither authorized nor assented to the use of his name; nor did the circumstances of the case raise any estoppel against him.

Dictum of *Parke*, B., as to estoppel in *Freeman* v. *Cook* (2 Ex. 654), approved of.

APPEAL from a decision of the First Division of the Court of Session, *Scotland.*

In February, 1879, *John Fraser*, grocer, *Greig Street, Inverness*, took to the agent there of the Respondents, the *British Linen Company*, a bill for £76, dated the 7th of February, 1879, payable at two months from date. The bill bore to be signed by *John Fraser* as acceptor, and by the Appellant, *Duncan M'Kenzie*, and a man named *John Macdonald* as drawers and indorsers. The agent discounted the bill, though neither the Appellant nor *Macdonald* had any previous dealings with the *British Linen Company*. The bill became due on the 10th of April, and was not paid. On the 12th of April, which was a Saturday, the agent for the Respondents posted a notice of dishonour to both the drawers. The Appellant received this notice on the same evening; but he did not go to the bank. On the Monday following *Fraser* called at the *British Linen Company's* bank with a blank bill bearing to be signed by the Appellant and *Macdonald* as drawers and indorsers, and by himself as acceptor. The signatures of the Appellant and *Macdonald* were apparently the same as the signatures in the bill dated the 7th of February, 1879. *Fraser* requested the agent to renew the former bill, but he refused to do so for the full amount, but on payment by *Fraser* of £6 to the account of the bill of 7th of February, 1879, the blank bill was filled up with the sum of £70. It then purported to be a bill dated the 14th of April, 1879, for £70, drawn by the Appellant and *Macdonald* on *Fraser*, payable at three months date, and indorsed by the two drawers to the Respondents. The bill of the 7th of February was then delivered to *Fraser*.

On the 14th of July, three days before the bill dated the 14th of April fell due, the agent for the Respondents wrote to the Appellant, "Your bill on *John Fraser* for £70 is due on 17th July, and lies at the office for payment." This was received by the Appellant, but he did not then come to the bank. The bill was dishonoured on the 17th of July; and the agent for the Respondents wrote to the Appellant, "Your bill on *John Fraser*, 14th April, for £70 is lying in my hands under protest for non-payment. Be so good as to order it to be retired immediately." Receiving no answer, the agent wrote on the 21st of July calling the Appellant's attention to the bill, and intimating that if it were not paid on the 25th of July it would be put in the hands of

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the law agent for the bank for legal proceedings. The Appellant not replying, the matter was put in the hands of Mr. *Ross*, the bank's law agent; and he on the 25th wrote to the Appellant and *Macdonald*, demanding payment of the contents of the bill. On the 29th of July Mr. *Ross* was waited on by Mr. *McGillivray*, the Appellant's solicitor, who then on the Appellant's behalf declined to pay the bill on the ground that the signatures thereto bearing to be his were forgeries. This was the first intimation that the Respondents received that the signatures to the bill were forgeries.

It was not suggested that there was any change in the position of the bank between the 14th and 29th of July.

The Respondents charged the Appellant to make payment of the amount of the bill of the 14th of April, 1879, on the ground that it was drawn and indorsed by him, or with his knowledge and authority, and that he was aware that the said bill, having his name as drawer and indorser thereon, was presented to the bank; and if he did not draw and indorse the bill himself, he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attached to drawing and indorsing them.

The Appellant raised a note of suspension of the charge, and a proof was adduced before the Lord Ordinary.

The Appellant is a contractor in a small way of business at *Abriachan;* he is not unfamiliar with bill transactions. He stated shortly, in his evidence that he never had any transactions with *John Fraser*, the acceptor. He had received a note from him dated the 11th of February, in which he asked him to call as "he had some particular thing to tell him;" but he did not pay any attention to that letter until he received the notice of the 12th of April from the Respondents of the bill of the 7th of February, 1879. He then thought he must be the *John Fraser* mentioned therein, and he went to him on the Monday following and asked him if he had anything to do with the bill, *Fraser* admitted to him that he had forged his name, but he solemnly assured him that he had paid the bill by cash. *Fraser* handed him the bill of the 7th of February, and he took it away with him. Before he parted with *Fraser* he got from him a letter, post dated the 15th

of April, to the effect that before that date he (*M'Kenzie*) had not signed a bill in his (*Fraser's*) favour. He got that letter, he said, to "shew that he had nothing to do with it, and that he had cleared the bill with cash." He then had a dram with *Fraser* in a public-house, and *Fraser* lent him £3 or £4 for a few days, which he paid back. He did not make any inquiry at the bank as the bill had been cleared by cash. Then when he received the notice of the 14th of July he again went to *Fraser*, and accused him of not being "through with him when he did not tell him he had put in a new bill to relieve the other"; but *Fraser* assuring him that he would be ready to meet the bill when due, he did not then inform the bank. But on getting the second notice of dishonour he went to *Inverness* and put the matter in the hands of his law agent Mr. *McGillivray*, instructing him to protect him against the forgery. *McGillivray*, with the view of saving *Fraser*, in which attempt *M'Kenzie* appears to have assisted, spent some days in trying to get the bill of the 14th of April renewed by another, but was unsuccessful.

The man *Macdonald* said that he had no knowledge of the second bill until he received the bank notice, and as to the first bill *Fraser* sent him a note that he had squared it, and not to mind the bank notice; *M'Kenzie* also told him it was squared.

The evidence of *John Fraser* himself, who had been by this time committed for trial on a charge of forgery, and of his father was of quite an opposite character. *John Fraser*, the forger, said the Appellant came to him to get the first bill renewed before he (*Fraser*) went to the bank about it; and that the Appellant had authorized the renewal in his name, and *Macdonald* had also authorized his signature.

The father of *John Fraser* stated that his son told him *M'Kenzie* had signed both bills, and *M'Kenzie* himself told him he had signed the second bill and put it all right.

The Appellant's material plea in law was:

1. The signatures upon the bill charged on, bearing to be the complainer's, never having been written by him, or with his authority or knowledge, and the Respondents' averments of adoption being unfounded in fact, and insufficient in law, the complainer is entitled to have the charge suspended.

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The Respondents' pleas in law were:

1. The said bill having been drawn and indorsed by the complainer, or with his knowledge and authority, there are no sufficient grounds for suspending the charge thereon.

2. The complainer having adopted said bills, is barred from pleading the forgery thereof.

The Lord Ordinary (1) held that the truth of the Appellant's contention was established by the evidence.

Against this decision the Respondents reclaimed, and in that action did not impeach the allegation that the signatures were forgeries.

The Lords of the First Division (Lord *Shand* dissenting), on the 4th of June, 1880, recalled the Lord Ordinary's interlocutor, and repelled the reasons for the suspension on the grounds (1) that the Appellant was perfectly aware, or at least had very good reason to believe, that the first forged bill was replaced by the second forged bill, and that he permitted that to be done and acquiesced in the proceeding; and (2), that assuming such knowledge and acquiescence on the part of the Appellant not to be established, he must nevertheless be said to have adopted the bill charged on by reason of his failure to give information to the Respondents that his signature was forged after the receipt of the notices sent by the Respondents in July, 1879 (2).

Against this decision the Appellant appealed, suing *in formâ pauperis.*

Feb. 3, 4, 8. Mr. *David Brand* and Mr. *Rhind* (of the Scotch Bar), contended for the Appellant—who was a simple and illiterate man, though not unacquainted with bill transactions—that it was clearly shewn by the evidence adduced that he did not know of the existence of the first bill until he received the notice of dishonour sent on the Saturday, the 12th of April; nor any knowledge or suspicion of the second bill until the arrival of the notice of the 14th of July. It was proved that at the earliest moment he could he went to the forger, who solemnly assured him that the bill had been paid by cash, and believing the forger, could not be said to be unnatural or unintelligible. Then as to

(1) Lord *Adam.* (2) Court Sess. Cas. 4th Series, vol. vii. p. 836.

the other bill, so far as shewing any desire to adopt the forged signature as his own, they submitted he had done all that occurred to him to repudiate it. His silence as regards the bank, from the 14th to 29th of July, did not alter the position of the bank, or put the bank in any worse one, for the bank's position was unalterably fixed on the 14th of April. Nor could he be said to have misled the bank by his silence on the 14th of April, for its agent, without waiting to hear from him a longer time than from a Saturday to a Monday, on that very day renewed the bill—a bill the signatures to which the agent had accepted as genuine—without the slightest previous attempt to find out whether they were so or not. The only evidence against the Appellant was that of the *Frasers:* persons whose testimony could not be held to outweigh that given by the Appellant and the man *Macdonald.* The forger was then awaiting his trial, and both he and his father were interested in giving evidence in a certain direction. Therefore, though it might be said that the Appellant had been careless in not making inquiry as to the truth of *Fraser's* statement on the 14th of April of the bank; they submitted that it was not proved that the Appellant tacitly or otherwise authorized the use of his name on the bill charged, or that he ratified or adopted his forged signature thereto, or that he was now estopped from relying on the forgery. The law of *Scotland* and *England* as to bills of exchange was not dissimilar.

They commented on *Finlay* v. *Currie* (1); *Boyd* v. *Robertson* (2); *Fraser* v. *Maclennan* (3); *McArthur* v. *Paterson* (4); *Brown* v. *British Linen Company* (5); *Urquhart* v. *Bank of Scotland* (6). Cases of estoppel, *Cairncross* v. *Lorimer* (7); *Smith's* Leading Cases (8th ed.) vol. ii. at p. 896; *Freeman* v. *Cook* (8). These

(1) Court of Sess. Cas. 2nd Series, vol. xiii. p. 278.
(2) Ibid. vol. xvii. p. 159.
(3) Ibid. vol. xii. p. 208.
(4) Court of Sess. Cas. 1st Series, vol. iii. (2nd Ed.) p. 427.
(5) Court of Sess. Cas. 3rd Series, vol. i. p. 793.
(6) 9 Scot. Law Rep. 508.
(7) 3 Macq. 827.
(8) 2 Ex. 654. That was a case where, upon the sheriff seizing goods, a party had made certain representations as to the ownership of them, and the question was whether he was estopped from disputing the truth of what he had so said. Baron *Parke* said "the estoppel, therefore, if it be one, created by the conduct of the bankrupt in this case, is not opened by the omission to plead it, and the only question is, whether it be an estoppel? It is

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cases so far as affecting the question here will be found fully dealt with in Lord *Watson's* judgment (1).

J. B. Balfour, S.G. (*Scotland*), and Mr. *Chitty*, Q.C., for the Respondents, submitted that it was established by the evidence that the Appellant had before or on the 14th of April authorized the use of his name, or had on that date a knowledge that the second bill had been put in. On the other hand, taking it that he did not know till the notice of the 14th of July, from that date

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contended that it was upon the authority of the rule laid down in *Pickard* v. *Sears* (6 Ad. & El. at p. 474). That rule is, that where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. That was founded on previous authorities: in the cases *Graves* v. *Key* (3 B. & Ad. 318); *Heane* v. *Rogers* (9 B. & C. 586), and has been acted on in some cases since. The principle is stated more broadly by Lord *Denman* in the case of *Gregg* v. *Wells* (10 Ad. & E. 97), where his Lordship says that a party who *negligently* or *culpably* stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears*, must be considered as established. By the term "*wilfully*," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all the contracts made by them with third persons, on the faith of their being so authorized." Nearer the end of his judgment Baron *Parke* further says: "In truth, in most cases to which the doctrine in *Pickard* v. *Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it." See, also, *Jorden* v. *Money* (5 H. L. Cas. at pp. 214, 255), *Clarke* v. *Hart* (6 H. L. Cas. at p. 656), and *Howard* v. *Hudson* (2 E. & B. at p. 10[illegible] where this opinion of Baron *Parke* was acted on.

(1) *Post*, at p. 110.

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his silence, and his efforts to get the bill taken up constituted ratification and adoption.

On the Appellant's own evidence, it was clear that on the 14th of April he suspected the existence of the second bill. He found *Fraser's* shop, which could not be started without the forgery of the first bill, still a going concern, and that *Fraser* was able to lend him £4. The argument that he had no serious suspicion could not be maintained, as it left the post-dated letter of the 15th of April wholly unaccounted for. The Appellant stated the object of that letter was to shew that the bill was paid in cash, but it contained no words to that effect. If anything, that letter shewed that *M'Kenzie* wanted to make evidence in his own favour, in case the bill was not paid. Against the Appellant's evidence they had that of the two *Frasers;* and the fact that the bill was renewed on the very day of the Appellant's visit to *John Fraser*, corroborated their story. Then the Appellant's silence from the 14th of July, and his activity for over a fortnight, trying to get *Fraser's* uncle to take up the bill—to screen *Fraser*—leaving the bank in the dark while he tried to make provision to again deceive them—that and his knowledge of the first forgery, suggested that he himself was implicated, or, at all events, was of itself sufficient to infer adoption of the bill. They had here, they submitted, an element of conduct which, coupled with his silence, made him liable. Lord *Shand*, in the Court below, said that silence, even obstinate silence, or inaction, was not enough; but the Lord Ordinary, who acquitted the Appellant, was not of that opinion, and many cases could be figured in which assent may be inferred from silence, with a certainty just as absolute as it could be inferred from words. There was no doubt as to the law: if previous decisions were to be followed. In *Urquhart* v. *Bank of Scotland* (1), silence and inaction—failure to disclaim the bill until after nineteen days—were the grounds on which the charge was supported. That case was singularly like this—there the forger had previously forged the name of the suspender to several bills: here *Fraser* forged the Appellant's name to one bill only. In *Urquhart's Case* the person whose name was forged does not seem to have suspected the existence of the

(1) 14th June, 1872; 9 Scot. Law Rep. 508.

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bill until overdue—but in this case *Fraser* had the strongest reason to suspect the existence of the bill at the date it was drawn. The Lord Ordinary seemed to think that in *Urquhart's Case* the bank suffered prejudice by the failure of the suspender to disclaim the bill, but that did not appear to be the fact in either that case or *Brown* v. *The British Linen Company* (1)—a case of relevancy. For though the forger absconded in *Urquhart's Case*, he was afterwards apprehended, and in neither case was damage to the bank any part of the allegations of the charger; but here there was no doubt the bank was damnified by the Appellant's failure to communicate with them on the 14th of April. In *Findlay* v. *Currie* (2) it was distinctly settled that a charge might proceed on a forged bill if it had been accredited or adopted, there Lord *Fullerton* said that in such cases, the suspender is held barred from pleading that ground of suspension, and in that case there was no averment of anything but silence. The earlier case of *McArthur* v. *Paterson* (3), was no authority that mere silence may not be sufficient; and *Boyd* v. *Union Bank* (4) and *Warden* v. *British Linen Company* (5), were merely cases in which the facts were insufficient to prove adoption. They submitted that here the bank was misled and suffered from the Appellant's conduct, whose clear duty it was to have disclosed the forgery, and that the law which holds him liable on account of his failure to do so was sound in principle and wholesome in practice.

Mr. *Brand*, in reply.

The Law Peers delivered judgment as follows:—

LORD SELBORNE, L.C.:—

In this case there are two questions; the first whether the Appellant authorized or assented to the signature of his name as drawer and indorser of the bill of exchange of the 14th of April, 1879; the second, whether, if he did not, he has nevertheless so

(1) 1863; Court of Sess. Cas. 3rd Series, vol. i. p. 793.
(2) 1850; Ibid. 2nd Series, vol. xiii. p. 278.
(3) 1825; Court of Sess. Cas. 1st Series, vol. iii. (2nd ed.), p. 427.
(4) 1854; Ibid. 2nd Series, vol. xvii. p. 159.
(5) 1863; Court of Sess. Cas. 3rd Series, vol. i. p. 402.

acted as to be estopped from denying his liability on that bill in a question between himself and the Respondents, the *British Linen Company*.

If the first of these question ought to be answered in the Appellant's favour, I am clearly of opinion that the circumstances of the case raise no estoppel against him. He has done nothing from first to last by which the Respondents can have been led to act in any way in which they would not otherwise have acted, or to omit to take any step for their own security, or in any sense for their benefit, which they would otherwise have taken; nothing from which the Respondents or a Court of Justice could reasonably infer that he "adopted," or admitted his liability upon, this bill.

The merits of the Respondents appear to me to be extremely small. They took from *John Fraser* the first bill for £76 on the 7th of February, 1879, bearing the signatures of the Appellant and *John Macdonald*, without any knowledge of these parties, or of their handwriting, and without any inquiry whatever. The bill was not one which had been previously in circulation; it was offered by *John Fraser* to the bank to obtain a loan of money for his own benefit, for the purpose of paying for a grocery business which he was then taking up in *Inverness*. *John Fraser* had not been their customer before; they knew nothing of him, except that he had been in the employment of a respectable merchant who was one of their customers. On Saturday, the 12th of April, 1879—two days after the bill became due—they caused notice to be given to the Appellant, and also to *Macdonald*, both of whom resided and were in employments at some little distance from *Inverness*. But on the following Monday, before any reply had been or could reasonably have been expected to be received to these notices, they gave up this bill to *John Fraser* in exchange for £6 cash and for another bill which, when produced to Mr. *Williamson*, was signed in blank with the same names, and was filled up by *John Fraser* in Mr. *Williamson's* presence for £70, being the bill now in question. It is impossible for the Respondents to contend that any conduct or silence on the Appellant's part caused them to take either the first or the second bill, or to abstain, on the 14th of April, from doing anything for their own security which they would otherwise have done.

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The Respondents, on the 14th of July, 1879 (before the second bill became due), and again on the 18th and 21st of July (when it was overdue) gave notices to the Appellant; and on the 29th of July they were informed that he denied his signature to, and his liability upon, that bill. There is no principle on which the Appellant's mere silence for a fortnight, during which the position of the Respondents was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or to estop him from now denying it. What took place during the interval was unknown to the Respondents; and it has, in my opinion, no tendency to shew that, in point of fact, the Appellant then was, or admitted himself to be, or intended to become, liable. He communicated as early as the 18th or 19th of July with Mr. *McGillivray*, a law agent, expressly on the footing that his name had been forged, and that he was not liable. It is plain that Mr. *McGillivray* was desirous, if possible, to get some settlement made, by which criminal proceedings might be avoided. The Appellant was also quite willing that such a settlement should be arrived at, if it could be done without making him liable. No such settlement, however, was arrived at; and I am unable to discover in the communings which then took place, any ground, in fact or in law, on which the Appellant ought to be held to have become liable on the bill by reason of those communings, if he was not so before.

The question, therefore, in my judgment, is only one of fact; viz., whether the Appellant did or did not authorize or assent to the use made of his name on the 14th of April by *John Fraser;* and it appears to me that the *onus probandi* on this point rests entirely upon the Respondents, it being admitted that the signature to the bill of the 14th of April is not in the Appellant's handwriting. The question, I think, turns altogether upon what took place when the Appellant met *John Fraser* on that day. If it is shewn that he then knew, or had reasonable grounds to believe, that a new bill, with his name upon it, had been given by *John Fraser* to the Respondents, the conclusion (under all the circumstances) would be inevitable that he assented to, and became bound by, the use so made of his name. On the contrary supposition it is, of course, impossible to hold that he assented to

that of which he was ignorant, and which he had no reason to believe.

This is, in great measure, a question depending upon the credit to be given to the witnesses on each side. If *John Fraser* and his father are believed, the case against the Appellant is established. But *John Fraser* and his father (besides the discredit attaching *primâ facie* to a witness acknowledged to have been guilty of forgery, and to one closely related to him, and identified with him in feeling and interest), prove more than, in view of the undoubted facts of the case, I find it possible to believe. According to the father, *John Fraser* told him that the Appellant had actually signed both the bills; *Macdonald* said he had signed the second bill; and the Appellant said he had "put the second bill all right." According to *John Fraser* himself, the Appellant came to him to get the first bill renewed before he (*John Fraser*) went to the bank about it, and expressly authorized the renewal in his name. If these statements were true, the Appellant's signature was subscribed to both bills by his authority, and there was no forgery; nor was there any reason why he should not have signed the second bill himself. I am unable to place any reliance whatever upon the evidence of either of these persons.

The Lord Ordinary, who heard and saw the witnesses, gave credit to the Appellant, and refused it to the *Frasers*. Taking the case as it stands upon the evidence of the Appellant and of *Macdonald*, both of them distinctly deny knowledge that a second bill had been given, and, *à fortiori*, that it had been given in their names: the Appellant says he was solemnly and positively assured by *John Fraser* that the first bill had been taken up, not by way of renewal, but by payment: and the assurances given to *Macdonald* were that he "had squared it." I cannot but say that some of the circumstances, as they appear upon the evidence of these two persons, are, to my mind, suspicious and unsatisfactory. If the burden of proof lay upon the Appellant, I might perhaps doubt whether he had satisfied it. But the burden of proof is on the Respondents; and it is impossible, merely because there are some suspicious circumstances, not satisfactorily explained, to hold a man liable upon a bill which he did not sign or authorize, and of the existence of which he swears he was ignorant.

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The suspicious circumstances are: (1.) That the Appellant, after learning on the 14th of April that his name had been forged to the first bill, did not communicate with the bank; (2.) That he required the acknowledgment (No. 18 of process) to be given him under *John Fraser's* hand, which is dated the 15th of February, and which merely says, "Before the above date Mr. *Duncan M'Kenzie* did not sign a bill in my favour;" (3.) That when he took away the first bill of the 7th of February he did not destroy it, but gave it to a young man named *James Fraser* to keep, assigning as his reason "that it might be a warning to him not to do the like;" (4.) That the interview of the 14th of April ended in an adjournment to a public-house, and in a loan of £4 by the forger to the Appellant, which the Appellant says he afterwards repaid by the hand of *James Fraser*; and (5.) That there was the delay already mentioned in July, before the Appellant gave notice to the bank, that is to say, to Mr. *Williamson*, that the second bill was a forgery; and that, when he did say so, he blamed Mr. *Williamson* for not insisting "on a further reduction when the first bill became due."

This latter circumstance appears to me to amount to very little or nothing; and, after much consideration, I think that all the other circumstances admit of explanation upon the hypothesis that the Appellant was thinking of the first bill only, and had no idea that a second bill, also bearing his signature, had been given on the 14th of April, as easily as, or more easily than they do upon the contrary supposition. Evidently he had no sensitive feeling on the subject of forgery, so long as he did not himself suffer by it: he condoned it with great facility to *John Fraser;* he did not wish to inform against him; he was willing to remain on friendly and familiar terms with him, and perhaps also to squeeze out of him some temporary accommodation as the price of his silence, without regard to the difficulties he might be under, if he had really himself found the money to take up the first bill. But how that money was found (being himself unwilling to help) the Appellant might also not choose to inquire: it might have been borrowed from the uncle, *William Fraser*, or from somebody else, without making it necessary to suspect any second forgery. The document dated the 15th of April (whatever else may be said

or thought of it) is inconsistent with the story now told by the *Frasers*, and confirms (as far as it goes) the Appellant's statement that *John Fraser* did then assure him that there had been no renewal of the first bill, at all events in his (the Appellant's) name. The fact of the acknowledged forgery might suggest precautions against future forgeries, though there might be no knowledge, or belief, or suspicion, that any such had already taken place. The Appellant might, not unreasonably, consider it a proper precaution against any such possible repetition of the offence, to retain the first bill, to admit some persons whom he thought discreet, to his confidence about it, and to have, under *John Fraser's* own hand, what (in truth) amounted to an admission of the forgery of that document, and to an acknowledgment that he had, down to the 15th, signed nothing for *John Fraser's* accommodation. The possession of those papers gave the Appellant a strong hold over *John Fraser*. With the first bill in his own hands he had no longer anything to fear from the notice which he had received from the bank; and he might think it the most prudent course to abstain from making any communication to Mr. *Williamson* which might place him in the dilemma of either having to discover *John Fraser's* guilt, or seeming to admit that he had himself been liable on that bill. I do not say or think that the Appellant's conduct, if it is to be thus explained, was commendable or satisfactory: it was not such as might have been expected from a scrupulous man with a strong sense of moral propriety; but it was, on the other hand, by no means such as to require, for its explanation, that he should have had in his mind any belief, or even suspicion, that another forgery of his name had taken place on that 14th of April, contrary to the positive assurances which he states he had received from *John Fraser*.

The burden of proof is (as I before said) upon the Respondents. In my opinion they have failed to satisfy it. I think, therefore, that this appeal ought to be allowed, and I move your Lordships accordingly.

Lord Blackburn:—

My Lords, this case comes before your Lordships by way of appeal from the First Division of the Court of Session against an

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interlocutor by which the majority, consisting of the Lord President, Lord *Deas*, and Lord *Mure*, reversed the interlocutor of the Lord Ordinary, Lord *Shand* dissenting. As the Lord Ordinary (*Adam*), who tried the cause, saw the witnesses and heard them give their testimony, he had an advantage, in so far as regards any question depending on their credibility, which neither the Judges of the First Division nor your Lordships possess; and therefore, so far as anything turns on the credibility of the testimony, his judgment is not lightly to be overruled. As to the inferences to be drawn from admitted facts, the Lord Ordinary had no advantage over either the Lords of Session or your Lordships. I think, therefore, that though the numbers are three to two, the case comes before this House without any great superiority of authority.

It is not disputed that *John Fraser* took to the agent of the *British Linen Company* a bill for £76, dated the 7th of February, 1879, and payable two months after date, purporting to be drawn by the Appellant *M'Kenzie* and a man of the name of *John Macdonald* on and accepted by *John Fraser*, and that the agent discounted that bill, it does not precisely appear when, but about the date of the bill. It was understood between *Fraser* and the agent that when the bill became due the amount should be reduced and a renewed bill given and discounted for the balance. It is not now disputed that the names of neither of the drawers were in their own handwriting. The agent, who knew neither of them, acted entirely on the faith of *John Fraser's* representations. The bill became due, and was dishonoured on the 10th of April, 1879. On the 12th of April, 1879, which was a Saturday, and not before, a notice of dishonour was sent by post to *M'Kenzie*, and it is not disputed that he did receive it on the evening of that day. On Monday the 14th of April, *Fraser* came to the agent bringing with him a paper stamped for a bill, and with the names of *M'Kenzie* and *Macdonald*, apparently in the same handwriting as those on the bill of the 7th of February, written on it in the places where the names of the drawers and indorsers should be. *Fraser* wished the bill to be renewed for the whole amount. The agent declined to do that—but after talking it over, it was agreed to be renewed to the extent of £70, and that a larger reduction

would be made when the bill was renewed again. It was then filled up as it now is, so as to purport to be a bill dated the 14th of April, 1879, for £70, drawn by *M'Kenzie* and *Macdonald* on *John Fraser*, payable three months after date to their order, accepted by *Fraser* and indorsed by the two drawers to the *British Linen Company*. *Fraser* paid £6 and the charges. The bill of the 7th of February was then given up to *Fraser*, who took it away. The question in the cause is, whether on the facts proved, *M'Kenzie* is liable to the *British Linen Company* on this bill of the 14th of April.

Pausing for a moment here in my narrative of the facts now in dispute, it seems to me clear, though I do not think it is quite admitted, that the agent acted in discounting this bill as he had acted in discounting the bill of the 7th of February, entirely on his faith in *Fraser's* representations. Having sent off the notice of dishonour so late as the Saturday by post, he had no right to suppose the drawer would be with him so early as the morning of the Monday, and therefore the undisputed fact that *M'Kenzie* had not done anything to deny the genuineness of his signature could not, as yet, afford any new ground for believing it was genuine.

To proceed with the undisputed facts—*M'Kenzie* did not inform the *British Linen Company* that his signature to the bill of the 7th of February was a forgery. On the 14th of July, 1879, an intimation was sent by post to *M'Kenzie* that "your bill on *John Fraser, Greig Street, Inverness*, for £70 is due on 17th July, and lies at this office for payment." This was received by *M'Kenzie*, who did not come to the bank. On the 17th of July the bill was dishonoured, and on the 18th of July notice of dishonour was sent, which it is admitted was received by *M'Kenzie*. On the 21st of July, which was a Monday, a notice was sent that if not paid on Friday it would be put in the hands of their law agent. On the 25th of July the law agent, *Ross*, wrote, and on the 29th of July a writer of the name of *McGillivray*, who had been employed by *M'Kenzie*, informed *Ross* that *M'Kenzie's* defence was that his signatures as drawer and indorser were forgeries. This was the first intimation that was given to the bank that the genuineness of the signatures was denied.

The disputed facts depend on the effect given to the testimony,

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as to the credibility of which there has been a great difference between the Judges below. *M'Kenzie* had not only denied his liability to the bank, but he had charged *John Fraser* with having forged his signature. If this was a falsehood it was a very wicked one: and once having pledged himself to it, he had every motive to persevere in his falsehood. *John Fraser* was brought to give evidence from the prison to which he had been committed on *M'Kenzie's* charge, and had a very strong motive to try to fix *M'Kenzie* with responsibility even by a falsehood. It does not, however, by any means follow that he was not fixing him by telling the truth.

The testimonies of these two witnesses, as might be anticipated, are in direct conflict. The Lord Ordinary and Lord *Shand* believe *M'Kenzie* to swear truly when he says that he never knew or suspected that his name was on the second bill till he got the intimation of the 14th of July. The Lord President and Lord *Mure* believe, directly in contradiction of his testimony, that he was aware of it. The Lord President says, "I am disposed to come to the conclusion that the complainer was perfectly aware, or, to say the least of it, he had very good reason to believe, that the first forged bill was replaced by the second forged bill, and that he permitted that to be done, and acquiesced in the proceeding, and was clearly participant in the fraud that *Fraser* had committed upon the bank." Lord *Deas* I think proceeds upon another ground.

Before examining the testimony I wish to consider what it was relevant to prove, for I think some confusion has arisen below from not keeping the different points separate. As it is not now disputed that none of the signatures were written by *M'Kenzie*, being in fact all written by *Fraser* the acceptor, the burthen of proving that he was liable on them rests on the bank. If *M'Kenzie* authorized *Fraser* to write his name for him, he gave him a mandate to sign, and is, of course, liable, and there was no forgery on the part of *Fraser*. This is a question of fact depending on the evidence. If I thought it was satisfactorily proved that *M'Kenzie*, before *Fraser* uttered the bills with his name upon them, knew that *Fraser* was going to do so and took no steps to hinder him, I should not have much hesitation in drawing the

inference that he did authorize him. But even though it was not made out that the signatures were authorized originally, it still would be enough to make *M'Kenzie* liable, if knowing that his name had been signed without his authority, he ratified the unauthorized act. Then the maxim "*Omnis ratihabitio retrotrahitur et mandato priori equiparatur*," would apply. I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another. The Lord President says:

> There is another averment which brings out elements of particular importance in this case. This bill was a renewal of a previous bill with the same names upon it for the sum of £76. Upon the face of that bill the complainer and *Macdonald* were drawers, and *John Fraser* was the acceptor, and that bill had been also discounted with the *British Linen Company*, and this £70 bill, as I have said, was a renewal to the extent of £70 of that previous bill. The averment made is further: "He never intimated to the bank that the signature of his name to the first bill was a forgery, nor did he so intimate to the bank in regard to the second bill until a fortnight after he had received notice from the bank of the bill being due. If he did not draw and indorse the bills himself, he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attaching to drawing and indorsing them." There are two averments here which require to be distinguished. The one is that the complainer was aware that this first bill with his forged name on it as drawer was presented to the bank and discounted by the bank in reliance upon his name being genuine. That means, of course, that at the time at which it was presented to be discounted the complainer was aware that his signature thereon was a forgery; and if that is established I think the case is clear indeed, because in that case the complainer would be distinctly *particeps fraudis*, and probably answerable criminally. But the other averment is this—that by his conduct, not silence merely, but silence combined with his conduct, he allowed the bank to rely upon his signature being genuine, and so adopted it as his genuine signature.

Now I cannot but think that he here confuses two separate propositions of law: one to which I fully assent with another,

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which is that on which Lord *Deas*, as I understand him, bases his judgment, to which I do not assent, without qualifications which prevent its being applicable to this case. As I have already said, I think if he ratified to anybody or for any purpose the act done by *Fraser* as professing to be his agent, that for all civil purposes enured to make him liable just as if he had originally authorized that act, and his conduct and silence combined with his conduct may prove such a ratification; and if the phrase, "adopted it as his genuine signature" is to be understood as meaning that he ratified, I quite agree with what is said.

And I agree that though he did not ratify the act of *Fraser*, yet he may preclude himself, bar himself, by a personal exception from averring against the bank that the signature was not genuine. Lord *Deas* says "that a duty lies upon a party whose name is forged not to do or say anything that may mislead a bank. It is his duty not to say anything that may so far deceive a bank as to enable a forger to escape from justice, and thereby, for anything that he can tell, prevent the bank from recovering from him full indemnity. He is not entitled to speculate upon the consequences that may ensue if the bank is prevented from going immediately against the forger. He is bound to take for granted that the result will be to prevent them from recovering on the bill which otherwise they would." I agree that if he thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill which if the bank had known of the forgery they might have used, it would be a sufficient alteration in the bank's position to preclude him as against the bank. But when Lord *Deas* says: "In cases of this kind where he has peculiar means of knowledge whether his signature is forged or not, he is not entitled by saying or doing something, or not saying or doing something, to lead his neighbour to think that his signature is genuine to his neighbour's loss," he goes further than I am inclined to follow in the words "by not saying or doing something." And when he says, "there was here not only a moral but a legal duty on the part of the suspender to have informed the bank that his signature to the first bill was a forgery, and if he had done so there would not have been a second bill," I not only doubt his position that there was a legal duty then to

have informed the bank, but I deny his conclusion of fact. As I have already pointed out, the second bill was uttered to the bank before *M'Kenzie*, with the utmost diligence, could have informed the bank that the first was forged. It would be quite a different thing if it were proved that *M'Kenzie* knew that the bank had put the second bill with his name on it to *Fraser's* credit, and knew that at a time when he had reason to believe that he would be permitted to draw against it. His silence then would certainly prejudice the bank, and would afford very strong evidence indeed that *M'Kenzie* for *Fraser's* sake thus ratified *Fraser's* act for a time; and a ratification for a time would, I think, in point of law operate as a ratification altogether. But if *M'Kenzie* (as his case is) first knew that the bank had taken the second bill on the faith of his forged signature on receiving the intimation of the 19th of July, he knew that the bank were not going to give further credit to *Fraser* on the faith of that signature; and that all the mischief was already done. I cannot think that even if *M'Kenzie* had gone so far in his endeavours to shield *Fraser* from the consequences of his criminal act as to make himself liable to criminal proceedings for an endeavour to obstruct justice, that would bar him from averring against the bank that the signature was not his. Certainly I think that his not telling the bank on the 15th of July nor till the 29th of July that it was a forgery, and so letting them continue in the belief that it was genuine, if he had not induced it, could not so preclude him if, as I think was clearly the fact here, the bank neither gave fresh credit in the interval nor lost any remedy which if the information had been given earlier they might have made available.

The principles which I have above assumed to be law have been recognised in *England* ever since the clear judgment of Mr. Baron *Parke* in *Freeman* v. *Cook* (1). The Scottish cases cited at your Lordships' bar shew that those principles have not been so clearly recognised in *Scotland*. I leave to my noble and learned friend who is to follow me the task of commenting on the Scotch decisions, which he is much more competent to perform, merely saying that I have read them all, and that everyone I think is perfectly consistent with the principles I have stated, and I think their justice must be acknowledged by all.

(1) 2 Ex. 654; see note, *ante*, p. 87.

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As to the question whether the evidence of *M'Kenzie* is substantially true or not, I shall be more brief. The Lord President reads his statement as to the conversation which took place at *Abriachan Wood*, and draws the conclusion that *M'Kenzie* knew *Fraser* "could not have a penny to spare." I cannot go so far, but I think that it does shew that *M'Kenzie* doubted his solvency; the last inference which I should draw from that is that he would readily become surety for him. Soon after that conversation he received the letter of the 11th of February written, be it observed, after the bill of the 7th of February had been discounted. He says that he did not go in to see *Fraser* because he knew that there was no business between them he, *M'Kenzie*, would lose by not calling on him, but that when he received the notice of the 12th of April he recollected this letter, and suspected that *Fraser* had put his name to a bill, and accordingly went into *Inverness* on the Monday to see *Fraser*. I can see nothing incredible in this. Then he says that—

> We went into a back room where, shewing him the notice, I asked him if he had anything to do with this. He said he had, "but," he added, "it is not going to trouble you any more." I asked him what he meant by doing such a thing? *Q.* Doing what?—*A.* By forging that bill in my name. He said, "I did not not know the danger of it at the time." I told him I would not pass him, but would give him up to the Fiscal at once. He said, "You need not do that; I have the bill here, and it will not meddle with you after this." He shewed me the bill. *Q.* Was anything said between you about the renewal of the bill?—*A.* Not a word. I told him at the same time, "See that you don't put in another to relieve this one." And he said upon his soul and body he would not. He told me that he paid it in clear cash. This conversation between us was in Gaelic. I believed him when he said the bill was paid. With the bill he gave me I went up to the shop of Mr. *James Fraser*, No. 1, *Ness Walk*, who belongs to the same place as I belong to, and I gave him the bill and he kept it. I never saw *Fraser* of *Greig Street* again until I heard about the second bill.

Why he gave the bill to *James Fraser* to keep is never explained. If his story is true I see no motive for it; but if *John Fraser's* story is true I see as little motive for it.

Then there is what I think the strongest piece of evidence in favour of the bank. It is not brought in as a prominent part of their case, but in re-cross-examination:

> Re-cross-examined:—(*Shewn No.* 18; *letter dated the* 15*th of April.*) This letter was written by *Fraser* when the first bill was got up. He told me he would give me that letter to shew that I had nothing to do with it, and that he had cleared the bill with cash. I asked him for a letter to that effect. *Q.* Did

you say you wanted to shew the letter to your sister?—*A.* No. *Q.* Did you say your sister had been angry at you for going into the bill?—*A.* I could not say that for I did not go into the bill. I had had no quarrel with my sister about the bill. I told her from the first day that I got any notice of it that it was forged. On the day when I got No. 18 I dare say *Fraser* and I had a dram together, I think in the *Lorne*. I was not very long with him. I think he lent me £3 or £4 for two or three days. I was parting with him on the other side of the bridge, and said I had to look for £2 or £3 for a day or two, and he said, "I will give you that," and he gave me £4. That was repaid three or four days after I got it. I sent it to him by *James Fraser*. *Q.* Do you remember meeting *John Fraser* in *Greig Street*, near his shop, about the month of February, 1879, and asking him how he was getting on with his shop, and whether he would be able to clear the bill? *Objected to. Objection repelled.*—*A.* I don't mind of that occasion for it never happened *By the Court: Q.* How did *Fraser* come to give you the first bill that was forged.—*A.* When I went to him with the notice I had received from the bank, he had the bill settled in the bank before I got to his shop. *Q.* Did you ask him for it?—*A.* No, he shewed it to me to satisfy me that it was fully settled, and gave it to me. I don't know if he told me to take it away. He did not ask it back. *Q.* Did you put it in your pocket and go away with it?—*A.* Yes. *Q.* You told us the first time you spoke to *Fraser's* father was after the forgery became known in the district; but you said afterwards you spoke to him after you had got the first notice about the bill?—*A.* Yes. The forgery was quite current in the district after the first bill. It was known that it had been forged.

John Fraser, who is brought from prison to give evidence, gives, as might be expected, a very different account of the whole transaction. He says that *M'Kenzie* came into him, as he expected he would, to talk about renewing the bill. He is not asked when anything had occurred to make him expect *M'Kenzie* to come for that purpose, but clearly implies that *M'Kenzie* had before that had knowledge that the first bill was discounted, and that it was, when it became due, to be reduced in amount and renewed as to part; and he distinctly swears, both in chief and in answer to the Lord Ordinary, that *M'Kenzie*, before he went to the bank to get the bill renewed, authorized him to get *Mackenzie's* name put on the renewed bill. Why *M'Kenzie* did not write his own name on the blank stamp is never explained.

Then as to the transaction in the public-house, he says:

It was £5, or something that he wanted. I did not sign it until he came in, and he went to the *Royal Bank* to cash it there. I don't remember when I saw *Mackenzie* after I got the first bill from the bank, but he came to my shop and I shewed him the bill. We had gone to a public-house. I had left a boy in the shop. He said his sister and mother were kicking up a row at home against him

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for giving me the bill. I gave him the bill, or he took it and kept it. (*Shewn No.* 16.) This is the bill I gave him. I think he borrowed £5 from me on that date. We had some drink. I drank lemonade, and he drank whisky. We were alone together for a good long while. *Q.* Did you give him that bill, or did he take it?—*A.* He took it. As far as I remember, he did not say why he wanted it. He wanted to get a note from me that he would shew his sister, because they were kicking up a row. (*Shewn No* 18.) *Q.* Did he ask you at that time to write a letter, and did you write this letter. (*The Lord Ordinary again cautioned the witness.*)—*A.* I did, in order that he should shew it to his mother. *Q.* Did he say he wanted it because his sister was making a row about it?—Yes; so that they would not know about it. I think I wrote it in the public-house. I don't remember how much drink I had that day with him. He did not, so far as I remember, say why he wanted the old bill.

Now, if I could see my way to thinking it proved, as the Lord President does, that *M'Kenzie* knew that *Fraser* was in such want of money that he could not possibly have met the bill in cash, and had £3 or £4 over to lend, I should think that his borrowing £3 or £4 from him then would go very far to shew that he knew that *Fraser* had renewed the bill with *M'Kenzie's* name on it, and either had, as *John Fraser* swears, expressly authorized his doing so, or, at all events, then ratified it. And though it is imputing to *M'Kenzie* that he not only committed perjury for the purpose of defeating the just claim of the bank, but had committed the far more wicked crime of giving information to the fiscal leading to the making of a charge of forgery against *Fraser*, when he, *M'Kenzie*, well knew that *Fraser* had not committed forgery at all, yet no doubt that may be true. But I cannot think there is enough evidence to justify me in finding such a very serious charge proved. I think the evidence that *M'Kenzie* must have known that *Fraser* could not have had such command of money, by the aid of his friends or otherwise, to be able to pay £76 in cash is insufficient; and the evidence as to the loan itself is brought in so much by the way (not striking the Lord Ordinary, who tried the cause, as of importance), so that no opportunity was given to explain it, that I cannot rely upon it.

John Fraser's evidence is, I think, on the face of it so improbable that I cannot trust it. And it is distinctly in conflict with that of *Macdonald*. *John Fraser*, the father, no doubt says:—

I went to the bridge, and my son came past me, and I followed him and asked him how he had got on. He said to me, "The bill is all right." I did not

speak to *Duncan M'Kenzie* that day; but when I was repairing the road 150 yards from his house, I saw him one day, and he stood speaking to me, and said, "I am sure *John* would tell you about the bill." I said, "Yes." He said, "Well, I have put it all right now." This was after the bill was due in April. *M'Kenzie* said, "The bill is in my possession now." He tapped his breast as he said so. *Q.* Did he speak to you about the second bill?—*A.* He said the second bill was in before he got the first one out. I cannot say that he said that, but he meant that the second was in the bank before he get the first out. *Q.* Did he say how much the second bill was for?—*A.* He said there was too much in the first bill; that there was £76 in it, but that £6 had been taken off. I am quite certain he said that about that time.

This, if accurately remembered and truly reported, would shew an admission by *M'Kenzie*. But I cannot trust the accuracy of this evidence.

As to what happened afterwards, I have no doubt that *M'Kenzie* would have been quite content to say nothing about the forgery if *John Fraser* or *John Fraser's* friends took up the bill and freed him from responsibility. And I have no doubt that he delayed making the charge of forgery from the time when he received the intimation till the 29th of July, in hopes that they would do so; but, as I have already said, I do not think that he thereby made himself liable to the bank unless the bank was in some way prejudiced by that delay, which in this case it was not. I therefore agree in the motion which the noble and learned Lord has made, that the interlocutor should be reversed.

LORD WATSON:—

My Lords, the process of suspension in which the present appeal is taken was raised by *Duncan M'Kenzie*, the Appellant, in order to obtain a stay of summary diligence which the Respondents were proceeding to use against him on a bill of exchange, at three months, for the sum of £70 sterling, and bearing date the 14th of April, 1879, upon which his name appears as that of a drawer and indorser, along with another person of the name of *John Macdonald*.

The sole ground of suspension stated for the Appellant is, that the signatures upon the bill charged on bearing to be his, are forgeries. The Respondents on record denied that allegation, but the Lord Ordinary, who gave judgment in the Appellant's favour,

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held that its truth was established by the evidence. In the Inner House the Respondents do not seem to have impeached the soundness of that conclusion; and the Lord President accordingly states that "although originally the chargers denied that allegation it must now be taken that the complainer's signature certainly is a forgery."

The majority of the First Division of the Court of Session, consisting of the Lord President, Lord *Deas*, and Lord *Mure*, gave judgment against the Appellant upon these two grounds: (1.) that the Appellant was, to use the language of the Lord President, "perfectly aware," or at least "had very good reason to believe that the first forged bill was replaced by the second forged bill," and that the Appellant "permitted that to be done and acquiesced in the proceeding," and (2.) that assuming such knowledge and acquiescence on the part of the Appellant not to be established, he must nevertheless be held to have adopted the bill charged on by reason of his failure to give information to the Respondents that his signatures were forged, after receipt of the notices sent by them in July, 1879.

The first ground of judgment assigned by the learned Lords constituting the majority appears to me to negative the idea of forgery. I cannot conceive that *John Fraser*, the drawer of the bill, by whom the signatures of the Appellant were admittedly written, can be held thereby to have committed the crime of forgery according to the law of *Scotland*, if these signatures were written and used by him, as their Lordships hold it to be proved that they were, with the permission and acquiescence of the Appellant. And it does seem a strange thing that in the interlocutor under appeal the Respondents are found entitled to costs, but "subject to deduction of any expense that may have been caused to the complainer (Appellant) by the Respondent's denial of the averment of forgery."

But it is unnecessary to dwell upon these matters, because I agree with your Lordships, that neither of the views taken by these learned Judges is well founded, and consequently that the judgment of the First Division must be reversed.

Since the conclusion of the argument at your Lordships' Bar I have carefully perused the whole proof led by the parties; and

the opinion which I have formed upon the facts of the case is precisely the same with that which has been already expressed in the Court below by Lord *Adam* (the Lord Ordinary) and by Lord *Shand*. The real question arising upon the proof appears to be whether the account given by the Appellant, on the one hand, or that given by *John Fraser*, the forger, and his father on the other, is to be accepted as true. In estimating the relative weight of their conflicting statements it is of course necessary to take into account the whole facts and circumstances of the case established by evidence independent of the testimony of these three witnesses, and also to consider the degree of probability attaching to their respective statements. Giving due effect to these considerations I have come to the conclusion that the account given by *Duncan Mackenzie*, the Appellant, is to be believed, and that the contradictions of his statement which are to be found in the evidence of the forger and his father *John Fraser*, senior, are unworthy of credit. When testimony is directly conflicting, and the question at issue depends upon the credibility of certain witnesses, it is undoubtedly advantageous to have an opportunity of noting the demeanour of these witnesses whilst they are under examination; and the Lord Ordinary had that advantage in the present case. At the same time I should not be inclined to accept the opinion of the Lord Ordinary on that account, unless the opposing testimonies came to a very even balance. In the present case the weight of testimony appears to me, irrespective of the Lord Ordinary's opinion on that point, to be on the side of the Appellant; but it is nevertheless satisfactory to my mind that the Judge before whom the witnesses were examined expresses his unhesitating belief that the Appellant "gave a substantially true account of the various transactions which took place with reference to the bills."

Having arrived at that conclusion I do not think it necessary to criticise the evidence in detail. For reasons, some of which appear in the opinion of Lord *Shand*, and others of which have been assigned by your Lordships to-day, I am quite unable to concur in the view of the facts which was taken by the Lord President, as I understand with the approval of his brethren Lord *Deas* and Lord *Mure*.

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I therefore pass at once to the second ground of judgment, the alleged adoption of the forged bill by the Appellant. The facts material to this part of the case, which I hold to be instructed by the evidence, and which the majority of the First Division assumed as the alternative of their own view being negatived, appear to be these:—

(1.) That on the 14th April, 1879, the Appellant came to know that his signature, as drawer and indorser of a bill for £76, discounted with the Respondents' bank, had been forged by *John Fraser*, grocer, *Inverness*, the drawer—that, the forged bill was then delivered to him by the forger; and that the Appellant was informed and believed that the bill had been paid in cash.

(2.) That the bill had not been so paid but was retired by the forger paying £6 in cash and handing the bill charged on to the bank.

(3.) That on the 14th of July, 1879, written notice was sent to the Appellant that the £70 bill drawn by him on *John Fraser* would mature on the 17th, and lay at the bank office for collection; and that on the 18th of July a further notice was sent, giving the particulars of the bill, and intimating that it had been protested for non-payment.

(4.) That on the 21st of July, 1879, the local agent of the Respondents wrote the Appellant intimating that, unless the bill was forthwith paid by him, it would be placed in the hands of their law agent; and that on the 25th of July the law agent intimated by letter to the Appellant that proceedings would be taken against him if he did not pay the bill before the 28th of July.

(5.) That on receipt of the first notice of the 14th of July, the Appellant had good reason to know, and was in point of fact aware, that his signature had been again forged by *John Fraser*: and that on receipt of the second notice he went to *Inverness*, informed Mr. *McGillivray*, a solicitor there, of the fact, and instructed *McGillivray* to take steps to protect him against the consequences of the forgery.

(6.) That on the 29th of July, 1879, *McGillivray* informed Mr. *Ross*, the law agent of the bank, that the Appellant's signature was forged: and that two days thereafter the Appellant and *John Macdonald*, whose name was also on the bill, as a drawer and

indorser, called together upon Mr. *Williamson*, the Respondents' branch agent, and told him that their signatures were forged.

It is not suggested that there was any change in the position of the bank betwixt the date of the first notice given to the Appellant on the 14th of July and the 29th of July, when the Respondents were informed of the forgery: and it cannot therefore be alleged that the Respondents have sustained any loss or prejudice by his silence during that period. But the three learned Judges, composing the majority of the First Division, have nevertheless held that such silence is, in the circumstances above narrated, sufficient, according to the law of *Scotland*, to infer adoption of the forged bill by the Appellant. I am unable to concur in that judgment, it being my clear opinion that the right view of the case was taken in the Court below by Lord *Shand* and the Lord Ordinary.

The question whether a forged bill has or has not been adopted by the person whose signature is forged, is in reality an issue of fact and not of law. Still, adoption of a bill may be matter of legal inference from certain ascertained facts; and in the present case the inference which has been drawn by the Court below, adversely to the Appellant, appears to depend upon the fact, that after he came to know in July that the second bill had been discounted with the bank, he (the Appellant) kept silence, or at least did not inform the bank of the forgery of his own name until a fortnight or thereby had elapsed. The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in carefully chosen language by Lord *Wensleydale* in the case of *Freeman* v. *Cooke* (1). It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information.

(1) 2 Exch. 654; see note, *ante*, p. 87.

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I do not think that the Scotch cases which have been cited at the Bar bear out the proposition that silence, in circumstances such as occur in the present case, is *per se* sufficient to imply adoption of a forged bill. I shall now, before concluding, shortly refer to those cases in the order of their dates.

Maiklem v. *Walker* (1) was a case in which two brothers, who lived together, were in the year 1828 charged jointly to make payment of a bill upon which both their names appeared. A considerable time after the charge was given the goods of *A.*, one of the brothers, were arrested, whereupon *A.* immediately brought a suspension of the charge and diligence, alleging then for the first time that his signature to the bill had been forged by his brother *B.*, who in the meantime had absconded. The Court held that *A.* had made himself liable to pay the forged bill, and refused the suspension, Lord *Gillies* observing, "Is he to be allowed to acquiesce until the proper debtor makes his escape out of the country, and then to come forward and allege he has incurred no liability to the holder of the bill."

In *Findlay* v. *Currie* (2) the question was one of relevancy: and all that the Court decided was that the charger had made averments sufficient to entitle him to a counter-issue of adoption, in order to meet the issue of forgery taken by the suspender. The substance of the charger's averments was that after notice to him of the bill said to be forged and a demand for payment, the suspender had an interview with the charger's agents, when he was shewn the bill and did not deny his signature; that at a subsequent interview the suspender did not deny his signature, but "begged for time to see the bill," which was granted. In the meantime his brother, the alleged forger, absconded, and he then for the first time denied the authenticity of his subscription to the bill.

Boyd v. *The Union Bank* (3) was a decision upon the record, holding the charger's allegations of adoption to be irrelevant. The only allegation of the charger was to the effect that, although the bill was, during its currency, intimated to the suspender, he

(1) Court of Sess. Cas. 1st Series, vol. xii, p. 53.
(2) Court of Sess. Cas. 2nd Series, vol. xiii. p. 278.
(3) Court of Sess. Cas. 2nd Series, vol. xvii. p. 159.

kept silence and did not inform the bank that his signature was a forgery. In that case the Lord President (Lord *Colonsay*) said: "when a party is shewn a bill and makes no objection, and allows the creditor to remain in the belief that it is his signature, he has incurred a ground of liability through the loss incurred by that adoption. That principle might apply even though he was not shewn the bill which is the subject of discussion. If he had allowed the matter to lie over, and through his silence the whole was lost, an obligation might be incurred through that silence."

The case of *Warden* v. *The British Linen Company* (1) is a decision to precisely the same effect as the preceding. The Court then refused to grant a counter issue of adoption by two co-acceptors, both of whom alleged that their signatures to the bill were forged, upon the bare averment that they had taken no notice of a letter addressed to them by the bank, informing them of the existence of the bill, before it was due.

In the next case, that of *Brown* v. *The British Linen Company* (2), the Court sustained the relevancy of the charger's averments and allowed a counter issue of adoption. These averments were that the bill was intimated during its currency to the person alleging forgery,—that thereafter his agent, acting under his instructions, called at the bank and examined the bill,—that the agent did not state that his employer's signature was forged, but on the contrary, requested that the bank should send him an intimation when the bill fell due, and moreover gave the bank agent to understand that if the bill was not paid at maturity by *Walker* (the alleged forger) his client wished it to be renewed.

None of these decisions appear to me to give the least support to the doctrine that mere silence, after intimation, or even after demand for payment of a forged bill, necessarily implies adoption of a bill by one whose subscription to the bill is a forgery; and accordingly the Solicitor-General for *Scotland*, towards the close of his argument, mainly relied upon the case of *Urquhart* v. *The Bank of Scotland* which was decided by the First Division of the Court in the year 1872 (3).

(1) Court of Sess. Cas. 3rd Series, vol. i. p. 402.

(2) Court of Sess. Cas. 3rd Series, vol. i. p. 793.

(3) 9 Scot. Law Rep. 508.

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The case of *Urquhart* v. *The Bank of Scotland* (1) is not noticed in the regular reports, and is only to be found in the *Scottish Law Reporter*. The facts established by the proof in that case, as they are detailed in the report, were somewhat peculiar. It was proved that the suspender's signature to the bill charged on was forged: but it was also proved that notice of protest of the bill for non-payment was received by him on or about the 2nd of August, 1871, and that he wrote to the bank on the 23rd of August that his signature was a forgery, his friend and intimate, the forger, having in the meanwhile absconded. It was proved that the forger was subsequently tracked out and apprehended under a criminal warrant: and it was also proved that the suspender knew, or had good reason to know, that the forger had for some years previously been in the habit of forging his name upon bills, and that in June, 1870, he had given the forger money to retire one of those bills known by him to be forged. It is no doubt the case that the terms of the Lord Ordinary's interlocutor and of the judgment of the Inner House, as reported, lay great stress upon the silence of the suspender as warranting their decision, which was against him. But there were obviously many grounds for the decision other than his silence, and I think it must be assumed that the judgment proceeded upon the whole circumstances of the case and not upon silence alone. All I can say is, that if these grounds were in the view of the Court, the case was in my opinion well decided. But if it was intended by the Court to rest their judgment upon the mere silence of the suspender apart from other circumstances, which I greatly doubt, then, whilst agreeing in the result at which their Lordships arrived, I should be of opinion that the decision was not only unnecessary but erroneous.

LORD SELBORNE, L.C.:—

My Lords, before putting the question, it may be right to refer to the position in which the Appellant stands as suing here *in formâ pauperis*. I see that by the interlocutor, which your Lordships will reverse, expenses were given to the Respondents. Of course that will be put right, and that interlocutor will be

(1) 9 Scot. Law Rep. 508.

discharged; and the Appellant will have those expenses in the Court below. With regard to the costs in this House, the costs must be given in accordance with whatever is the general rule in the case of an Appellant being successful who appears here *in formâ pauperis.*

Ordered and adjudged, *that the interlocutor of the Lords of Session in Scotland, of the First Division, of the 4th of June,* 1880, *complained of in this appeal, be, and the same is hereby reversed, and that the interlocutor of the Lord Ordinary of the 3rd of February,* 1880, *be, and the same is hereby restored: And it is further* Ordered, *that the Respondents do pay or cause to be paid to the Appellant the costs following upon the reclaiming note in the Court below, and such costs in this House as have been incurred by the Appellant in appearing in formâ pauperis, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments.*

Lords' Journals, 11th February, 1881.

Agent for Appellant: *A. Beveridge.*
Agent for Respondents: *W. A. Loch.*

[HOUSE OF LORDS.]

L. (Sc.) 1881. Feb. 17.

CALEDONIAN RAILWAY COMPANY . . APPELLANTS;
NORTH BRITISH RAILWAY COMPANY . RESPONDENTS.

Statute 42 & 43 Vict. c. 155, ss. 3, 6 (Local)—Construction—Railway—Commencement of Payment.

17 Ch D 730
22 Ch D 148
499

The *Caledonian Railway Company* for thirteen years up to July, 1879, had been proprietors of the *D. and A. Railway*, and had incurred certain liabilities in respect to payment of dividends to preference and ordinary shareholders of the *D. and A.* line. The preamble of the *North British Railway* (*D. and A. Joint Line*) passed July, 1879 (42 & 43 Vict. c. clv.), set forth that it was expedient that the *Caledonian* and *North British Companies* should have equal rights and powers, and be subject to equal liabilities over and with respect to the *D. and A.* line. Sect. 3 provided that on and after the 1st of February, 1880, called the "vesting period," all interest which the *Caledonian* possessed should be transferred to the *Caledonian* and *North British* jointly and in equal proportions in manner hereinafter provided by the Act. Sect. 6 provided that the consideration for the transfer of the joint line shall be as follows: "(1.) From and after the vesting period the company (the *North British*) shall pay to the *Caledonian Railway Company* half-yearly on the 1st of March and 1st of September in each year a sum equal to one-half of the aggregate of the following half-yearly payments, for which the *Caledonian Railway Company* are now liable in respect of their acquisition of the *D. and A. Railway*."

The *Caledonian Railway Company* claimed that under this section there was a half-yearly payment amounting to £5903 15*s.* due on the 1st of March 1880:—

Held, affirming the decision of the Court below, that the liability to make payment in 1880 did not arise till September, the time of payment applicable to the first six months following the 1st of February, 1880.

Per LORD SELBORNE, L.C.:—The more literal construction of a section of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

APPEAL against a judgment of the First Division of the Court of Session, *Scotland*. In and prior to 1879 the Appellants, the *Caledonian Railway Company*, were proprietors of a line of railway between *Dundee* and *Aberdeen*. The southmost portion of that railway was called the *Dundee and Arbroath Railway*, and

the next portion northward *Arbroath and Forfar Railway*, and thence on to *Aberdeen*. The Respondents, the *North British Railway Company*, had erected the *Tay Bridge*, and were also in the course of constructing a line of railway from a point on the *Arbroath and Forfar Railway*, a little to the north of the *Arbroath* station, northwards by *Montrose* and *Bervie* to *Aberdeen*; and in the session of 1879 they promoted a bill, which afterwards became an Act on the 21st of July, 1879, to enable them to become joint proprietors of that portion of the Appellants' line between *Dundee* and the junction of the new line with the *Arbroath and Forfar Railway*. The question between the parties was founded upon the 6th section of that statute.

The material passage in the preamble of that Act is as follows: "And whereas it is expedient that all interest which the *Caledonian Railway Company* possess in the *Dundee and Arbroath*, and *Arbroath and Forfar Railways* respectively between . . . should be transferred to and vested in the *Caledonian Railway Company* and the *North British Railway Company*, in this Act called 'the company,' jointly and equally, and that those companies should have equal rights and powers, and be subject to equal liabilities over and with respect to the said railways between the points aforesaid as hereinafter provided."

By sect. 3 of the Act it is enacted that on the 1st of February, 1880 (in this Act called "the vesting period"), all interest of what nature or kind soever which the Appellants possess or enjoy in the railways aforesaid (thereafter to become the "joint line") "shall, by force and virtue of this Act, be transferred to and vested in the *Caledonian Railway Company* and 'the company' jointly and in equal proportions in manner provided by this Act."

Then the 6th section is as follows:

> The consideration for the transfer of the joint line shall be as follows (that is to say):—
>
> Sub-sect 1. From and after the vesting period the company shall pay to the *Caledonian Railway Company* half-yearly, on the first day of March and first day of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments for which the *Caledonian Railway Company* are now liable in respect of their acquisition of the *Dundee and Arbroath Railway* (that is to say):—(1) One thousand six hundred and sixty-seven pounds ten shillings, being the half-yearly dividend upon eighty-three thousand three hundred and seventy-five

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pounds of *Caledonian Railway Company* Four per Cent. Consolidated Guaranteed Stock into which the *Dundee and Arbroath Railway* Five per Cent. Preference Stock amounting to sixty-six thousand seven hundred pounds has been converted under the powers of the *Caledonian Railway (Additional Powers) Act*, 1875; (2) ten thousand one hundred and forty pounds, being the half-yearly dividend upon five hundred and seven thousand pounds of *Caledonian Railway Company* Four per Cent. Consolidated Guaranteed Stock into which the *Dundee and Arbroath* Ordinary Stock, amounting to two hundred thousand pounds, has been converted under the powers of the same Act; (3) the half-yearly contingent dividend (if and when payable by the *Caledonian Railway Company* and at the rate so payable) upon two hundred and nine thousand two hundred and forty-three pounds six shillings and eight pence of *Caledonian Railway Company* Deferred Ordinary Stock No. 1, allotted under the powers of the same Act to the holders of *Dundee and Arbroath* Ordinary Stock; (4) the half-yearly interest at the rate of five per centum per annum on the sum of eighty-one thousand six hundred and nineteen pounds six shillings and six pence being the amount of mortgage and other debts affecting the *Dundee and Arbroath Railway* and undertaken by the *Caledonian Railway Company* subject to deduction from that amount of such sum as shall be fixed by agreement between the two companies or determined by arbitration to have been the value of the rolling stock in use on the *Dundee and Arbroath Railway* at the time when that railway and rolling stock were acquired by the *Scottish North Eastern Railway Company*; and (5) a proportion of the rent (including the commuted amount of contingent profits) payable by the *Caledonian Railway Company* for the *Arbroath and Forfar Railway* corresponding to the portion of that railway by this Act transferred to the two companies as such proportion shall be fixed by agreement between those companies or determined by arbitration, and in the event of any sum payable by the company to the *Caledonian Railway Company* under the provisions of this section not being paid upon the day on which the same is payable as aforesaid the company shall pay interest thereon to the *Caledonian Railway Company* at the rate of five per cent. per annum from such day until payment thereof;

Sub-sect. 2. On the vesting period, or as soon thereafter as the amount shall be fixed or determined as hereinafter provided, the company shall pay to the *Caledonian Railway Company* a capital sum equal to one-half of the value of the joint line by this Act transferred to the two companies, subject to the half-yearly payments hereinbefore stipulated, provided that such sum shall in no case be less than one-half of the principal sums expended on capital account on the joint line by the *Aberdeen Railway Company*, the *Scottish North Eastern Railway Company*, and the *Caledonian Railway Company* respectively, or any of them, previously to such payment as the amount of such value shall be fixed by agreement between the two companies or determined by arbitration, and the company shall also pay interest to the *Caledonian Railway Company* on the said capital sum at the rate of five per cent. per annum from the vesting period till paid.

The payments Nos. 1 and 2 are both payments of dividends upon guaranteed *Caledonian* stock, in which certain *Dundee and Arbroath* stocks had been converted; and their history is shortly as follows:—In 1863 the *Dundee and Arbroath Railway* was united with the *Scottish North Eastern Company*, the *Dundee and Arbroath* stocks—preference and ordinary—becoming stocks of the *Scottish North Eastern Company*, but retaining their distinctive denominations. In 1866 the *Scottish North Eastern* was dissolved and amalgamated with the *Caledonian Railway Company* by the Act 29 & 30 Vict. c. cccl. (Local), and that Act formed the Appellants' title to the *Dundee and Arbroath Railway* line when it came to be transferred to the Appellants and Respondents jointly by the Act of 1879.

By sect. 1 of the Act of 1866 it was declared that the Act commenced from the 1st of August, 1866, and, sect. 5, that from that date the transfer of the undertaking was effectual. By this amalgamation Act the Appellant company took over the liabilities of the *Scottish North Eastern Company*, among the stocks being the two stocks of the *Dundee and Arbroath Railway*. The 12th section enacting "that the revenue of the *Scottish North Eastern Railway* available for dividend in respect of the half-year ending on the 31st of July, 1866, shall, notwithstanding anything herein contained, be divided among and paid to the holders of shares and stock in that company as if this Act had not passed."

By sect. 16 every proprietor of *Dundee and Arbroath* Five per Cent. Preference Stock was to receive the same amount of guaranteed stock in the Appellant company.

By sect. 17 it was enacted that a guaranteed dividend of five per cent. should be paid by the Appellants upon this stock, the amount of which was £66,700.

By sect. 19 ordinary shareholders in the *Dundee and Arbroath Railway* became guaranteed shareholders in the Appellant company, with a contingent right (sect. 21) to a higher rate of interest than the guaranteed dividend, in the event of the dividend on the *Caledonian* Ordinary Stock being over seven per cent.

By sect. 22 it was provided "that all the guaranteed, and preference, and contingent dividends hereinbefore mentioned shall be payable on the same days in the months of March or April,

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and September or October, as the other preference and ordinary dividends" of the Appellant company shall be payable. "The first payment thereof being on the same day in the month of March or April, 1867, as such other preference and ordinary dividends for the six months ending on the 31st of January, 1867, shall be payable."

The Appellants averred (Cond. 3) of the above payments specified under sub-sect. 1 of sect. 6 of the Act of 1879, no dividend has yet become payable by the Appellants, and therefore no payment is due by the Respondents under No. 3; and the amount of the sums due under No. 4 and No. 5 has yet to be fixed by agreement, or determined by arbitration; but the amount payable under Nos. (1) and (2), being one half of (1) £1667 10*s.*, and (2) £10,140, is fixed by the Act itself, and there is no reason why this amount, being the sum concluded for, £5903 15*s.*, should not be at once paid by the Respondents to the Appellants. The said sum fell due and payable on the 1st of March, 1880, being the first day of March after the vesting period.

The Respondents answered—the sums sued for are not due, nor will they become due till the 1st of September, 1880. They are the amounts of dividends not payable by the Appellants until the day in September or October, 1880, which may be appointed by the Appellants for payment of their preference and ordinary dividends for the half year ending the 31st of July, 1880.

The Lord Ordinary (1) held that the 6th section was intended to describe the course of payments which were to be made in perpetuity, and fixed, generally, the terms of payment in each year without reference to the particular term when the payments were to commence. And that the operation of the obligation for relief commenced only when the rights commenced; and therefore the liability to make the payments did not arise till the 1st of September, 1880, the time of payment applicable to the first six months following the 1st of February, 1880. The Appellants having brought a reclaiming note against this decision, the Lords of the First Division, 16th of July, 1880 (Lord *Mure* dissenting), adhered to the Lord Ordinary's interlocutor, and refused the reclaiming note with expenses (2).

(1) Lord *Rutherfurd Clark.*

(2) Court Sess. Cas. 4th Series, vol. vii. p. 1147; 17 Scotch Law Rep. 777.

On appeal,

Feb. 11, 15. Mr. *Benjamin*, Q.C., and Mr. *Chitty*, Q.C., contended, for the Appellants, that sect. 6 dealt with the price or consideration to be paid by the Respondents to the Appellants for getting into the partnership; and had no reference to the equal rights of parties in the joint line after that partnership had been entered into. The payments in question were not dividends at all, but simply payments of a price, the amount of which is ascertained on the basis of dividends payable by the Appellants. The price consisted of two parts, first, a sum equal to half the value of the line (sub-sect. 2)—and that value may exceed the cost—and, secondly, the Respondents enter, on the 1st of February, 1880, as joint owners, and for that right they pay half what the Appellants had to pay. The payment was like an asset in the hands of the Respondents, and not rent for occupancy. The agreement was that the Respondents should become joint masters of the line on the 1st of February, 1880, and the Appellants said if they did they must pay to them half of all they had to pay and were then liable for, on the 1st of March and 1st of September.

The preamble referred solely to the rights of parties after the line had been transferred, and not to the consideration the Respondents had to pay for that transfer. If the intention of the Act had been to give the Respondents one-half of the property of the joint line, at precisely the same amount as one half of its cost to the Appellants, one would have expected that the provision of sub-sect. 2 would have been different, and that it would simply have enacted that the capital sum which the Respondents had to pay would be one-half of the principal sums expended on capital account on the joint line by the Appellants; but that was not the language of the statute. The Respondents were to pay the Appellants a capital sum equal to one-half of the value of the joint line, whatever that may be found to be by the arbitrator, provided that it shall not be less than one half of the principal sums expended on capital account thereon, but it was clear that it might be a great deal more than that sum. It might be said to be unfair to ask payment for a thing which the Respondents are not in the enjoyment of, but that was the bargain; and though the language of sect. 6 may seem harsh, it could not now be said

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what were the reasons presented to Parliament for so wording it. They had there expressly enacted that from the vesting period, that is, from and after the 1st of February, 1880, on the 1st of March and 1st of September in each year, these payments shall be made. The language was explicit, and admitted of only one construction; and it would be a violent straining of the statute to say that it did not mean the 1st of March following.

J. B. Balfour, S.G. (*Scotland*), and Mr. *Asher*, argued, for the Respondents, that up to the last day of January, 1880, the whole profits of the *Dundee and Arbroath* line went into the coffers of the Appellants, and the dividend payable in March, 1880, following, was payable for that half-year.

From the 1st of February, 1880, the line is in the hands of the two companies, and, accordingly, the dividends payable for the first half-year of the joint administration is that falling due in September, 1880. But the effect of the Appellants' demand would be, as is avowed, that over and above the Appellants being put in funds by the Respondents to meet each dividend earned during the joint occupation of the line, the Appellants would receive a bonus or premium equivalent to one half of the amount of a half-yearly dividend on the *Dundee and Arbroath Railway* stocks.

The dominant scheme and purpose of the Act was equality of the two companies in liabilities as in rights, that purpose was declared in the preamble, and was consistently carried out in all the provisions of the Act. And, as far as capital was concerned, there was to be absolute equality, for if the value of the line was found to be more than that expended on it, the Appellants were to have half; and it followed, if the value was less, then they must bear half the loss.

The other items of sect. 6 other than those in dispute, consist in recouping the Appellants for what they lose by the Respondents being invested in one-half of the transferred property. Under the Respondents' construction that principle is consistently carried out. But assuming the Appellants' construction, a bonus or premium is conferred upon them in two particulars—Nos. 1 and 2—of sect. 6, and this by language which effects equality in all the other particulars which it governs. They submitted that

it is not rigidly laid down when the first payment was to take place. It was true that the Respondents are to pay on the 1st of March and the 1st of September in each year, from and after the vesting period, but that was clearly a prescription of the standing rule and periods of payment, for the endurance of a perpetual obligation, and its application was to be determined by the nature of the payments thus directed. The dividend they were asked to pay was one applicable to the 31st of January, 1880, and therefore for the Appellants to ask them to pay on the 31st of March, would be asking them to pay for a time when they were not in the enjoyment of the railway, which was not the intention or the construction of the Act.

Mr. *Benjamin*, in reply:—

The Act was passed in July, 1879, and the payments are expressly fixed for the 1st of March and the 1st of September, therefore, how could the 1st of March, 1880, be excluded from the Act? The attempt here was to change by subtleties the express words of the Act, and make a bargain between these parties which they did not intend to make at the time. The Respondents want to make the Act say September, 1880, and March and September every other year.

The Law Peers delivered judgment as follows:—

LORD SELBORNE, L.C.:—

My Lords, I cannot say that I think this case free from difficulty. There is always some presumption in favour of the more simple and literal interpretation of the words of a statute, or other written instrument, and so much as this must, I think, be conceded to the Appellants, that the 6th section of the *North British Railway* (*Dundee and Arbroath Joint Line*) *Act*, 1879, does at first sight seem to appoint the 1st of March, 1880, as the day on which the first of a series of equal half-yearly payments is to be made by the *North British* to the *Caledonian Company*. This impression is produced, not only by the *primâ facie* import of the introductory words of the first clause of the section, but also by the facts, that instead of saying that the *North British Company* shall pay and contribute one-half of the specified half-yearly

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liabilities of the *Caledonian* at the times when they respectively become due, the Legislature has said that it shall pay "a sum equal to one-half of the aggregate" of these liabilities; and that it shall do so half-yearly, on days which confessedly do not correspond with the times at which the liabilities in question will become payable in respect of the same half years by the *Caledonian Company;* and which must therefore (to some extent) involve payments in advance by the *North British Company* with the benefit of interest to the *Caledonian*, if those payments are not punctually made. On the other hand, it may justly be said that this arrangement would not be substantially at variance with the principle of an equal division of these liabilities between the two companies, if the amount to be paid by the *North British* were in fact equal to one-half of the liabilities of the *Caledonian Company* in respect of each of the same half years; the *Caledonian Company* being answerable for the whole amount to the creditors; and that it was not unreasonable that the *North British Company* should be bound to contribute beforehand their share of this amount so that the *Caledonian Company* might always have funds in hand to make the payments at the proper time. The more literal construction ought not to prevail, if (as the Court below has thought) it is opposed to the intentions of the Legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

17 CLD 750
9 GBD 197

The Court below has founded its judgment mainly upon the intention, unquestionably declared in the preamble of the statute, that the two companies "should have equal rights and power, and *be subject to equal liabilities* over and with respect to the railways" (between the points therein mentioned) "as thereinafter provided." If the effect of the Appellants' construction of the 6th section would be to disturb, and that of the Respondents' construction to preserve, the equality contemplated by that preamble, this is an argument of much weight in the Respondents' favour.

The Appellants have contended that the word "liabilities" as used in the preamble ought to be understood only of such liabilities of the "joint line" as might for the first time come into existence, after the 1st of February, 1880 (the "vesting period,"

when the union of interests between the two companies was to take effect); and not of any, which, though accruing due after that period, might result from obligations previously contracted by the *Caledonian Company*.

The words "as hereinafter provided" suggest the inquiry, what subsequent provisions, as to "liabilities," there are in the Act? As to "rights" and "powers," there are various detailed provisions. As to "liabilities" (if the 6th section were excluded), I find the word mentioned only in sub-sect. 23 of sect. 8, where it relates, not to any burdens which were to be borne equally, but to some which were to be thrown solely upon one company, in exoneration of the other, because arising out of that company's own acts or defaults. The working expenses of the joint line are provided for, on the principle of equality, by sub-sect. 24 of sect. 8 (and perhaps also by sect. 12); and all expenditure upon capital account for new works is provided for, in like manner, by sub-sect. 31 of sect. 8. Future liabilities, having their first inception after the vesting period, are, no doubt, in this way covered: but it is rather under the conception of outlay or disbursement, than under that of liability or indebtedness.

On the other hand, all the payments, of which one moiety is thrown upon the *North British Company* by sect. 6, are declared, on the face of that section, to have been, when the Act passed, "liabilities" of the *Caledonian Company* ("payments for which the *Caledonian Company are now liable*") *in respect of their acquisition of the Dundee and Arbroath Railway;* being a railway in which the two companies were to have equal rights:—liabilities which, though arising out of obligations previously contracted and others in force, would accrue and become due periodically, in every half-year after the vesting period. According to the natural meaning of the words used in the preamble, they were "liabilities" to be met and provided for after the vesting period, quite as much as if they had then first originated; and they were also liabilities "with respect to the said railways between the points aforesaid," because the *Caledonian Company* had incurred them "in respect of their acquisition of the *Dundee and Arbroath Railway*." According to the reason of the thing, as apparent from the 2nd subsection of clause 6, and from the admitted operation of the 1st

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sub-section of that clause in every half-year but the first, they come within that principle of equality on which the preamble is founded.

I conclude, therefore, with the Court below, that we have, in that preamble, a sufficient guide to the solution of anything which may be ambiguously or imperfectly expressed in the 1st sub-section of sect. 6, if one construction would produce, or substantially approximate to, and if another would defeat, or substantially depart from, equality.

With this guide, it seems to me that if we regard the influence of the introductory words, "*From and after the vesting period*," as pervading the whole sentence in which they occur (so as to apply not only to the direction to pay, but to the ascertainment of those "half-yearly payments" for which the *Caledonian Company* were liable, of which one-half was to fall on the *North British Company*), we shall do less violence to the intention manifested by the Legislature than if we were to confine them to the mere direction for payment, so producing an arbitrary and substantial inequality between the two companies in the first half-year, and in that half-year only. I read the clause as if it had been expressed thus:— "The company shall pay to the *Caledonian Railway Company*, half-yearly, on the 1st day of March and 1st day of September in each year, a sum equal to one half of the aggregate of the following half-yearly payments, for which the *Caledonian Railway Company* are now liable in respect of their acquisition of the *Dundee and Arbroath Railway;* such liabilities of the *Caledonian Railway Company* to be ascertained as from the 1st day of February, 1880, and such payments to be made by the *North British Railway Company* accordingly." So understood, a liability of the *Caledonian Company* which (though postponed as to the declaration of the state of account on which its amount depended, and as to the time of payment till a later date) had really and in substance accrued before the 1st of February, 1880, belongs to a period antecedent to the vesting, and ought to be excluded from the computation. Under the Act of 1866 those liabilities of the *Caledonian Company* which are numbered 1, 2, and 3 in the 1st sub-section of sect. 6 of the present Act, had really accrued on the 31st of January, 1880; they were, by the express terms of that

Act, dividends payable, as of right, for the half-year ending on that day, out of profits earned during the year then ended, exclusively of all subsequent profits. Every fact on which the right and the liability depended was then fixed, and capable of being ascertained. The payment was at that time *debitum*, if, on taking the account, the profits earned in the preceding year should be found sufficient to meet it; and the facts, that this would not be done till the usual time for the declaration of a dividend in March or April, and that the payment would not be made till afterwards, could not make the liability itself attributable to a half-year subsequent to the 1st of February. There is more, I think, than guess or speculation in the argument of the Respondents' counsel that the vesting period was fixed for that day (the 1st of February) for this very reason, that according to the previous Acts of Parliament that was the day which divided the earnings and the liabilities of one half-year from those of another.

This conclusion is fortified, rather than otherwise, by the nature of the fourth and fifth items in the first sub-section of sect. 6; one of them representing interest, accruing in point of law *de die in diem*, and the other rent, apportionable over the whole period in respect of which it accrued. One of these two items was, in the year 1880, properly apportionable between the period before and that after the vesting; so that the mention of a payment to be made on the 1st of March was not, as to that particular year, nugatory, according to the construction which excludes all liabilities properly referable to the time before vesting. It is apparent, on the face of the section, that the sum payable in any one half-year would not necessarily be the same as in every other half-year; it would on each half-yearly day be a moiety of such of the liabilities mentioned as were *de facto* and *de jure* payable by the *Caledonian Company* in respect of the current half-year, considering the first half-year as having its commencement on the 1st of February, 1880. Independently of the fact that something (though, no doubt, a small sum) would, in fact, be payable according to this construction, on the 1st of March in the first year, I should think any inference drawn merely, or chiefly, from the mention of March, before September, in this contract, very precarious. The phraseology of the clause may well be supposed to

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follow the natural order of the months in the calendar, in view, not so much of one particular year, as of the long tract of time during which these periodical payments would recur.

One other argument of the Appellants' counsel requires notice; that founded on the words which introduce the 6th section: "The consideration for the transfer of the joint line shall be as follows." If a bargain for payment of a premium, or for some other advantage to the *Caledonian Company* had been recited, or ought to be inferred from this clause itself or from any other part of the Act, no doubt this might properly be described as a "consideration." But the assumption of half the existing liabilities of the joint line, and the repayment of half the cost and value of the existing permanent way, &c., might, with quite equal propriety, also be so described. There is no recital in the Act of any bargain such as the Appellants' argument supposes; there is a recital that the liabilities, generally, were to be borne equally, which is *primâ facie* inconsistent with the supposition that an unequal apportionment of the existing liabilities, so as to give some advantage (in one half-year only) to the transferring company, was part of the consideration. The inferences, therefore, to be drawn from the rest of the Act repel rather than support the view that there was any such bargain. With the language and scheme of this clause itself I have already dealt.

Upon the whole I am unable to dissent from the decision of the Court of Session, and I move your Lordships to affirm the interlocutors appealed from and to dismiss the appeal with costs.

LORD BLACKBURN:—

My Lords, I also have come to the conclusion that the interlocutors should be affirmed and the appeal dismissed with costs. The matter turns upon the construction of an Act of Parliament which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing we are to consider what the facts were in respect to which it was framed, and the object as appearing from the instrument, and taking all those together, we are to see what is the intention appearing from the language, when used with reference to such facts, and with such an object. The facts here and the object are all apparent

without stepping out of the Act itself, and those other Acts of which, being public Acts, we must take judicial notice.

As appears by the recitals here, and by these Acts, the *Caledonian Railway Company* were, at the time the Act in question received the Royal assent, owners of the line originally made by the *Dundee and Arbroath Company*, whilst it was a separate and independent company. They were also lessees of a line which originally was made by the *Arbroath and Forfar Company* when they were an independent company, and which was let in perpetuity at a fixed rent to the *Aberdeen Company*, from whom the *Caledonian Company* acquired the lease. And the *North British Railway Company* had an interest in the *Dundee East Station*, and an interest in the station at *Broughty Ferry;* and the recital in the preamble of the Act is that it is expedient that the whole of the *Dundee and Arbroath Railway* belonging to the *Caledonian Company*, and a portion of the *Arbroath and Forfar* line belonging to the *Caledonian Company*, and the whole of the interest of the *North British Railway Company* in those two portions, should from a certain day become transferred to and vested in the company (that is in the *North British Company*) jointly and equally with the *Caledonian Company*, and that the *North British* and *Caledonian Companies* should have equal rights and power, and be subject to equal liabilities in this, which is called the joint line. That is the object of the Act.

In order to understand what follows, I think it is necessary to consider for an instant how and in what manner the *Caledonian Company* acquired the *Dundee and Arbroath Company's* line. That line was originally made by the *Dundee and Arbroath Company*, then an independent company, by means principally of money contributed by shareholders who took shares, and those shareholders in respect of the money they had advanced which had been thus spent, received, or were entitled to receive, dividends accruing during the half years into which the railway year is divided.

In *Scotland* in general, and in the case of all the companies with which we have now to deal in particular, the railway year is divided into halves, one beginning on the 1st of February and ending on the last day of July, and the other beginning on the

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1st of August and ending on the 31st of January. The shareholders of the *Dundee and Arbroath Railway Company* were entitled therefore at that time to payments which accrued during each half-year ending on those days; perhaps the amounts were not at that date ascertained, but they then became ascertainable, and became *debita in præsenti* to them at the conclusion of each half-year, that is to say, upon the 1st of February and the 1st of August in each year. They were not payable then; they were payable at the time when the company should declare its dividends, which time is by the statutes provided to be in the months of March or April and the months of September or October, and which in practice was almost always about the end of March and end of September. They might for all practical purposes be considered as payable *in futuro* upon the last day of March and the last day of September: they were therefore *debita in præsenti solvenda in futuro.*

When the *Scottish North Eastern Railway Company* acquired this line they bought it from the *Dundee and Arbroath Company*, and the shares of the *Dundee and Arbroath* line ceased to exist; there were substituted for them shares of the *Scottish North Eastern Railway* equivalent in value, or supposed to be equivalent in value, thereto. When the *Caledonian Company*, in their turn, acquired the line, there were substituted for these *Scottish North Eastern* shares, shares of the *Caledonian Company* which were equivalent in value, or supposed to be equivalent in value thereto. Subsequently by the *Caledonian* Act for simplifying the accounts and shares, they were enabled to convert these, so that those who represent the original *Dundee and Arbroath* shareholders, where they held *Caledonian* preference shares before, now hold *Caledonian* 4 per cent. stock, the dividends on which are equal within 6*s.* 4*d.* to the amount which was payable before. And for the contingent dividend, which depended upon whether the *Caledonian Company* should earn 7 per cent. or not, there was substituted an amount of *Caledonian* deferred ordinary stock No. 1, the dividend on which, I presume, is calculated, but I do not exactly know how, as being equal to the dividend which they would have had in respect of their original contingent dividend. But the stocks into which the original shares were converted now all retain that

original feature, that the dividends on them accrue in the half year, and become *debita in præsenti* on the first day of the next half-year—the 1st of February, for example; but are not payable till March or April, although practically payable on the last day of March—*debitum in præsenti solvendum in futuro.* These are the three first items in sect. 6, sub-sect. 1, which I have to deal with.

But the railway was not built by means of money advanced by the shareholders alone; it was also built in part with borrowed money, for which the *Dundee and Arbroath Company*, borrowing the money upon mortgage, were liable. This borrowed money was laid out partly in building the line and partly in buying rolling stock and other moveable properties. When the *Scottish North Eastern Company* acquired the line they took upon themselves the liability to make good this mortgage debt, and they took to themselves absolutely, and I suppose have long ago used up all the rolling stock that was there—the balance (after deducting the value of the rolling stock) was part of the cost of the line, and that the *Caledonian Company* became liable for, substituting their liability for this mortgage debt for that of the *Dundee and Arbroath.* The interest on that mortgage is the fourth of the items in sect. 6, sub-sect. 2, and there it is mentioned that the proportion payable for the rolling stock is to be ascertained by arbitration and to be deducted, and the rest is to be considered part of the liabilities.

Now, though interest no doubt accrues *de die in diem*, yet, by convention between the mortgagees and the company, it was payable upon the usual term days in *Scotland*, that is to say, at Whitsuntide, on the 15th of May, and on Martinmas, the 11th of November. *De die in diem* that interest was accruing, but it was payable *in futuro* upon those two days. And it does so chance, and it makes a little complication, that the periods beginning upon the 15th of May and 11th of November are not coterminous with either of the periods of six months into which the railway year is divided. Two months and a half of the interest, though accruing *de die in diem* during the railway half-year, would not be yet payable on the termination of the railway half-year. These are the first four items, and they are all concerning the *Dundee and Arbroath* line.

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There is a further item which I must notice, not that it was of so much consequence, but that it throws, in my mind, a good deal of light upon the construction of the Act. It is mentioned in the proviso contained in the 2nd sub-section. Besides those moneys which had been furnished by the shareholders and by the mortgagees, which the *Caledonian Company* had not advanced, but the interest upon which they had become bound to pay, the *Scottish North Eastern Railway Company* and the *Caledonian Railway Company* had spent, or at least are assumed in this proviso to have spent, money in improving the line, and maintaining the line afterwards; that is mentioned in the proviso which is in the centre of the 2nd sub-section, as part of the cost of the line, moneys which the *Caledonian* or the *Scottish North Eastern Company* had actually disbursed out of pocket, and which had gone towards building this line.

Then comes the fifth item mentioned in the 1st sub-section of the 6th section which is as to the *Arbroath and Forfar* line. It is by no means the whole of that *Arbroath and Forfar* line that is to be part of the joint line, it is only a very small portion, but still it is a portion. The perpetual lease of the *Arbroath and Forfar* line had been acquired upon the terms that the *Caledonian Company* should pay an annual rent, originally in part contingent, but since ascertained and become commuted for a fixed sum, which annual rent is for the whole railway year, beginning to accrue upon the 1st of February, but not being payable until that year expires, upon the 1st of February ensuing. Accruing, as it does, during the whole course of the year, it becomes *debitum in præsenti* and *solvendum in præsenti* at the same instant of time that the latter railway half-year expires. The amount of the rent which is apportionable to the portion of line which is to be taken by the joint company is to be determined by arbitration; that is provided for under the fifth head of the 1st sub-section of the 6th section.

Now, taking these facts, which all appear upon the Acts, and which I hope I have succeeded in stating in such a way as to make them intelligible, we come to see how, and upon what terms, has the Legislature carried out the intention which they declared in their preamble, to convey this joint line to the two companies,

to be held jointly, with equal rights and subject to equal liabilities. They have done this in three sections. First, I mention the 4th and 5th, which refer to the interest of the *North British Company* in the two different portions of the joint line. As to each of those, they say they shall be vested jointly in the two companies as part of the joint line, upon terms to be fixed by agreement between the two companies, and failing agreement, by arbitration. So far as the *North British Railway Company's* interest is concerned, therefore, we have nothing to do with that—it is to be settled elsewhere; but as regards the *Caledonian Company's* interest, the 3rd section says: "On the 1st day of February, 1880, in this Act called the vesting period, all interest of whatever nature or kind soever which the *Caledonian Company* possess or enjoy" in the *Dundee and Arbroath Railway* "shall by force and virtue of this Act be transferred to and vested in the *Caledonian Railway Company* and the *North British Company* jointly and in equal proportions in manner provided by this Act," and "the manner provided by this Act" is that specified in sect. 6, upon the meaning of which the controversy arises. I think, as I said before, the facts I have mentioned are all material to the construction of that section.

Now I believe there is not much doubt about the general principle. Lord *Wensleydale* used to enunciate (I have heard him many and many a time) that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately, in *Grey* v. *Pearson* (1), in the following terms: "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in *Westminster Hall*, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." I agree in that completely, but unfortunately in the cases in which there is real difficulty it does not help us much, because the cases in which

(1) 6 H. L. C. at p. 106.

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there is real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words, used with reference to the subject-matter, is. To one mind it may appear that the most that can be said is that the sense may be what is contended by the one side, and that the inconsistency and repugnancy is very great, that you should make a great stretch to avoid such absurdity, and that what is required to avoid it is a very little stretch, or none at all. To another mind it may appear that the meaning of the words is perfectly clear—that they can bear no other meaning at all, and that to substitute any other meaning would be, not to interpret the words used, but to make an instrument for the parties—and that the supposed inconsistency or repugnancy is perhaps a hardship—a thing which perhaps it would have been wiser to have avoided, but which we have no power to deal with. This present case is about as good an illustration of that as can very well be. The Court below did not cite what Lord *Wensleydale* said—perhaps as they were Scotch lawyers not English ones, they had never heard of it, but the Lord President said (1), after commenting upon the clause and saying what he thought of it, "There is nothing in this clause, I think, that is fairly susceptible of that construction. At the very best, the argument could go no further, I think, than this,—that the words which I have cited are ambiguous—that it may be intended that there should be such an anomalous thing as this" (that is what Lord *Wensleydale* would call an inconsistency), "and it may not. It may be merely intended to express that these are to be the days of payment in each year, but not that it is to commence on the 1st day of March, 1880; and if there be ambiguity at all—if there be room for two constructions—then I apprehend we must appeal to the whole scope and purpose of the Act." So that in the Lord President's view of the words of this Act (which I shall comment upon myself presently) Lord *Wensleydale's* rule would be in favour of the *North British Railway Company*.

Lord *Mure* takes quite the opposite view of it. He says, in effect and substance, that the words are quite clear, and that they do mean, as the *Caledonian Company* says, that there shall be a payment made upon the 1st of March, 1880, and that that may be

(1) Court Sess. Cas. 4th Series, vol. vii. at p. 1152.

a harsh bargain; he calls it an inequitable bargain. I am inclined to agree with what the learned counsel for the Appellants said, that this last is not a correct phrase; a bargain is a bargain. If a man chooses to bargain that he will pay ten times the value of a thing, I do not think you have, in the absence of undue influence, any right to cut down the price to the tenth part of what was agreed upon. But although this may be a harsh bargain (Lord *Mure* urges), he saw no reason for interfering with it, he says that the plain sense of the words is what the *Caledonian Company* contend, and that there is no such repugnancy or inconsistency as to lead one to modify them. If Lord *Mure's* view of the words is right, Lord *Wensleydale's* rule would be altogether in favour of the *Caledonian Company*.

The 6th section begins thus, after saying "the consideration for the transfer of the joint line shall be as follows," it says "from and after the vesting period." Pausing here for a moment: the vesting period is the 1st of February, 1880, and the counsel for the Appellants argued, "Put in the 1st of February" instead of "the vesting period," and it will read "from and after the 1st of February, 1880." Now, that, I do not think, was quite right. I think if the words had been "the 1st of February," that the argument on behalf of the Respondents would have been that they put in that date because it was the vesting period, and that therefore it should be read as if the vesting period had been mentioned, and not the particular day. That argument is not needed, for the Legistature expressly said, "From and after the vesting period the company"—that is, the *North British Company*—"shall pay to the *Caledonian Company* half-yearly, on the 1st day of March and the 1st day of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments for which the *Caledonian Railway Company* are now liable in respect of their acquisition of the *Dundee and Arbroath Railway*—that is to say—" Then it mentions the four first items I have already referred to.

Now what I have to say here is, that I think the words "now liable" require to be expanded or explained, for I think a great deal of the argument of the Appellant was rested upon what seemed to me a fallacy in that respect. The Legislature is speaking on the

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21st of July, 1879, a few days before the railway half-year (which would terminate upon the last day of July of that year) expired. At that time, in the sense of being liable to make a present payment, the *Caledonian Company* were liable for nothing. There had accrued a certain part of the dividends during the half-year which would terminate at the end of July—the greater part of those had accrued at that time, a small portion, ten days, had yet to accrue, and upon the 1st day of August then ensuing the company would become liable as *debitum in præsenti* for the amount of those dividends, and upon the last day of September they would become liable to make payment *in præsenti* of that money, so that both that portion which had accrued in respect of that half-year, and that which still had to accrue would become payable long before the vesting period. The interest upon the fourth item, the mortgage money, had been paid up to the 15th of May. At this time, nearly two months, two months and a small fraction of the next ensuing six months had expired, and during that time interest accruing *de die in diem* had accrued against the *Caledonian Company*, and when the 11th of November came afterwards, interest would have accrued for the remaining three months and something more than a half,—and then, and not until then, upon the 11th of November, 1879, interest upon the mortgage money would be payable.

But at the time when the Legislature was speaking, neither of these were liabilities in any sense; and the same remark applies exactly to the 5th head, that portion of the rent of the *Arbroath and Forfar Railway*, which was in respect of that portion which was to be part of the joint line. The rent was accruing from the 1st of February, 1879, and it would all become due upon the 1st of February, 1880; but no portion of that rent was on the 21st of July, 1879, either due or payable. Therefore the *Caledonian Company* were liable only in this sense, that under statutory engagements the *Caledonian Company* would be liable for them as debts when they had accrued, and would be liable to pay them when the period for payment had arrived; some of them would have accrued and would be payable before the 1st of February—others will have accrued on or before the 1st of February, but would not be payable till afterwards—others will accrue

after the 1st of February, 1880, and be payable afterwards. Now it is with this view that I mention it, the words, in my view, require, not to be altered, but to be expanded and explained—when that is done, I think the rest of the 6th section is intelligible and can be construed readily. I may say that the whole of the 6th section must be taken together—it is divided into the 1st sub-section, and the 2nd sub-section, but we must not construe the 1st sub-section until we have mastered and understood the meaning of the 2nd; we must not construe the 2nd sub-section until we have mastered and understood the meaning of the 1st, and then the two must be taken together. In explaining your views, you take first the 2nd or the 1st as seems convenient. I prefer to take the 2nd sub-section first to explain what it means; it begins, "On the vesting period, or as soon thereafter as the amount shall be fixed or determined as hereinafter provided, the company," that is, the *North British Company*, "shall pay to the *Caledonian Railway Company* a capital sum equal to one half of the value of the joint line by this Act transferred to the two companies, subject to the half-yearly payment hereinbefore stipulated." They therefore took the value of the line as the value of the line, subject to these half-yearly payments. Strictly it was not subject to them. The line had before it had been acquired by the *Scottish North Eastern Company* been liable for them. As a matter of fact, the *Caledonian Company* became liable for them, and were to keep down the interest on them, so that they no longer, strictly speaking, were burdens upon the *Dundee and Arbroath Railway Company*. But it is plain the Legislature are here dealing with them as if they were burdens.

Then comes the proviso, "provided that such sum shall in no case be less than one-half of the principal sums expended on capital account on the joint line by the *Aberdeen Railway Company*, the *Scottish North Eastern Railway Company*, and the *Caledonian Railway Company* respectively, or any of them, previously to such payment, as the amount of such value shall be fixed by agreement between the two companies or determined by arbitration." I point that out, because, although I suppose probably the value would be larger than that cost, and that proviso would not come into play, it is plain enough that part of the consideration is to be

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the transfer of the actual fixed line—the real property of the line on payment of the value as it might be, never to be less than the money actually expended upon it, and subject to the payments for those various charges which were in reality payments of interest in respect of money which had been expended upon the line, but which capital sum had not been paid by the *Caledonian Company*, the *Caledonian Company* merely becoming liable, in the sense I have already explained, to pay interest for those different sums. And that does seem to me to be pretty strong to shew that when the payment was to be the value of the line, as it was upon the 1st of February, subject to these half-yearly payments, it meant the value of the line as it was upon the 1st of February, subject to the half-yearly payments which would both accrue and become payable after that date, and not, as the *Caledonian Company* contend, subject to all such half-yearly payments which, though they had accrued as a *debitum* before the vesting period, had not been paid before that.

I think that view is fortified by what follows, namely, that "the company shall also pay interest to the *Caledonian Railway Company* on the said capital sum at the rate of 5 per cent. per annum, from the vesting period till paid." Interest upon the money they had actually disbursed and spent, if the proviso comes into operation, is to run from the 1st of February—payments to keep down the interest upon money which had been previously spent, surely one would say were payments to keep down that which accrued as well as become payable after the 1st of February. I think that is enough to make me say that the construction which the *Caledonian Company* contend for, that the payments shall include, not only those which have accrued subsequently to the 1st of February, 1880, but also those payments which had accrued previously to the 1st of February, 1880, but were not in fact payable till afterwards, is an inconsistency with the general object.

Now let us see, that being so, and that being, as it strikes me upon that view, a repugnancy and inconsistency with the general scheme, are the words so strong that one must say that they must not be, as Lord *Wensleydale* would say, modified to that extent necessary to avoid it? The first point is that the payments shall be made half-yearly on the 1st of March and the 1st of September

in each year. Now I agree with the conclusion come to by the Lord President that the most natural meaning of that is, not that the first payment shall be upon the 1st of March, 1880, but that the 1st of March and the 1st of September are the two days in the year upon which such payments as are to be made at all shall be made, those shall be the termly days upon which the payments shall fall due and become payable hereafter, after the bargain is completed. It might mean, not merely that this 1st of March and 1st of September shall be the termly or pay days. Lord *Deas* says generally in Scottish leases it is commonly expressed "beginning the first payment" on a particular day. If the Legislature had said the first payment to be on the 1st of March, 1880, I should have understood it.

But it then goes on to say, "for which the *Caledonian Company* is now liable." I have already explained my view upon that point, and substituting for those words the detailed explanation I have given, it does seem to me that it bears the meaning that there are these three sums which are both accruing and payable before the vesting period. Such as the interest payable in November, 1879, and the dividends payable in September, 1879; no one could contend that the *North British Railway* is to pay any part of that. As regards that portion which is both accruing in the period subsequent to the 1st of February, 1880, and payable afterwards, no one could dispute that the *North British Company* were to pay half of that, the question is, whether the words are so clear as to shew that the *Caledonian Company* is to receive and the *North British Company* to pay half of that interest which the *Caledonian Company* had become bound to keep down, which interest had accrued in respect of the period before the vesting period, though not payable till after. I have perhaps worked myself into the condition of thinking it clearer than it really is, but my feeling is that the fair and ordinary grammatical meaning of the words would be in favour of the *North British Company*. I am quite content to say that at least, as the Lord President says, it is ambiguous, and might bear one meaning or the other. The passages I have pointed out in the 2nd sub-section as to the value, and the recital in the earlier part that they are to be on equal terms, all strongly lead me to the conclusion that there is

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a repugnancy and inconsistency with the general object of the scheme of the Legislature in saying that they should include those, and consequently, taking Lord *Wensleydale's* golden rule, which I have already quoted, and applying it literally to that, I think that the words, if they do not actually mean what the *North British Company* say, at least are so near it that it is no strain upon them to say that they do mean what the *North British Company* say they do, and that to put the other construction upon them would produce such a manifest inconsistency with the general scheme of the Act, that the *North British* construction should be adopted. That is in substance the view which the majority of the Court of Session have adopted; and I think the decree ought to be affirmed, and, of course, affirmed with costs.

LORD WATSON:—

My Lords, the controversy between these two companies turns upon a very narrow point, and appears to me to be attended with considerable difficulty. But I have come to be of opinion that, taking into account the scope and object of the other clauses of the Act of 1879, the construction of sub-sect. 1 of sect. 6 which has been adopted by the majority of the Judges in the Court below is the right one.

The leading purpose of the Act was to vest in the Appellants and Respondents jointly and in equal proportions, "on and after the 1st day of February, 1880, therein termed the 'vesting period,' (1) the *Dundee and Arbroath Railway*, and (2) a part of the *Arbroath and Forfar Railway*." These were originally separate undertakings, but had been amalgamated with and vested in the *Caledonian Railway Company* under an Act of 1866; and the terms of the preamble shew that, except in so far as otherwise provided, the two companies were "to have equal rights and power and be subject to equal liabilities over and with respect" to the joint lines.

By the terms of the statutory arrangement under which the *Dundee and Arbroath Railway* was absorbed in the undertaking of the *Caledonian Company*, the preference and ordinary stocks of the *Dundee and Arbroath Railway* were severally converted into *Caledonian Railway Company* Four per Cent. Consolidated Gua-

ranteed Stock; and a certain amount of *Caledonian Railway Company* Deferred Ordinary Stock No. 1 was allotted to the holders of *Dundee and Arbroath* Ordinary Stock. The Appellants were accordingly liable to pay in perpetuity a half-yearly dividend at the rate of four per cent. per annum upon these converted stocks, and of a contingent dividend upon the Deferred Ordinary Stock No. 1; besides which they were liable to pay interest at five per cent. on £81,619 6*s.* 6*d.*, being the amount of mortgage and other debts affecting the *Dundee and Arbroath Railway*.

The *Arbroath and Forfar Railway* was, in the year 1846, transferred to the *Aberdeen Railway Company* under a perpetual statutory lease, by which the original shareholders of the line leased became entitled to a fixed yearly rent, together with a share of profits, above a certain limit, which might be earned by the lessors. This contingent share of profits was afterwards commuted for a fixed annual payment; and the Appellants' company, prior to the Act of 1879, were owners of the *Arbroath and Forfar* line as part of their general undertaking, and were consequently liable to pay the aforesaid annual rent *plus* the commuted amount of contingent profits.

The half-yearly dividends upon the stocks of the Appellants' company are derived from profits earned during the six months respectively preceding the 31st of January and the 31st of July in each year. And the dividends upon the stocks assigned to the *Dundee and Arbroath* shareholders accruing during these periods, are, by statute, made payable "on the same days in the months of March or April and September or October, as the other preference and ordinary dividends of the company shall be payable." Interest upon the mortgage and other debts affecting the *Dundee and Arbroath Railway* is payable half-yearly at the terms of Whitsunday and Martinmas (15th of May and 11th of November) in each year; whilst the rent falling due in respect of the *Arbroath and Forfar Railway* is payable yearly on the 1st of February.

It appears to me to be clear that it was not intended by the framers of the Act of 1879 that the *Dundee and Arbroath Railway* and the part in question of the *Arbroath and Forfar Railway* should vest in the Appellants and Respondents freed of all incumbrances; but, on the contrary, that it was to become vested

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in them jointly, subject to those perpetual termly payments of dividends, interest, and rents which the *Caledonian Company* was under obligation to make to original shareholders and creditors of these undertakings or their successors. That obligation was, in substance, a statutory condition attaching to the right of the Appellants' company as owners and occupants of these two railways.

Had these termly payments been made specific charges upon the railways vested in the two companies by the Act of 1879, and the revenues thence arising (as in the case of moneys heritably secured on land), the *North British Company* would have become liable in respect of their joint ownership to pay one half of the dividends, interests, and rents accruing after the vesting period, without any statutory provision to that effect. But the shareholders and creditors of the *Dundee and Arbroath Railway* and the shareholders of the *Arbroath and Forfar* line, although they might still have a lien over what had once been their own undertakings, had become either shareholders or creditors of the *Caledonian Company,* and were entitled to payment of their dividends, interest, and rents out of the revenues of that company. It formed no part of the scheme of the Act of 1879 to alter the rights of these parties, or to disturb their position as shareholders and creditors of the *Caledonian Company;* and it was therefore necessary to make some provision as to the manner in which the *North British Company* was to bear its fair and equal proportion of the termly payments made by the *Caledonian Company* in so far as these accrued after the vesting period. That sect. 6, subsect. 1, of the Act was *inter alia,* designed to meet that necessity, does not appear to me to admit of serious dispute. The Respondents maintain that it was intended to accomplish that object and nothing more; but the Appellants contend that it was thereby intended to make the *North British Company* not only liable for dividends and rents accruing after that company became a joint owner, but for a half-year's dividends which accrued before the vesting period, whilst the Appellants' company had the sole property and possession of the railways falling within the vesting clause of the Act.

Section 6, sub-sect. 1, enacts that: "From and after the vesting period the company" (that is, the *North British Company*)

"shall pay to the *Caledonian Railway Company* half-yearly on the first day of March and first day of September in each year a sum equal to one half of the aggregate of the following half-yearly payments for which the *Caledonian Company* are now liable," and then follows a specification of the several dividends, interest, and rent already mentioned—the sum payable in the case of the *Dundee and Arbroath Railway* being a proportion of the total amount of rent and commuted profits corresponding to the portion of that railway by the Act transferred to the two companies.

The words of the statute which I have just quoted do not appear to me to fix conclusively that the Respondents are to pay to the Appellants on the 1st of March, 1880, one month after the vesting period, half-yearly dividends which had accrued before that period, and which were payable in respect of the property and use of the *Caledonian Company* alone. At the time when the Act received the Royal Assent the dividend paid by the *Caledonian Company* in September or October, 1879, had not yet accrued, and therefore the expression "half-yearly payments for which the *Caledonian Railway Company* are *now* liable" must refer to dividends to accrue at some future time, and not necessarily to dividends accruing before the vesting period; and the words "half-yearly on the first day of March and first day of September in each year" do not, in my opinion, necessarily imply that full payments shall be made at both of these terms in the first year subsequent to the vesting period. They would be equally appropriate as designating the terms of payment throughout the course of years which was to follow the vesting period, if it had been expressly enacted, in another clause, that the *North British Company* was not to be liable except for one-half of the dividends, rents, and interest accruing after the vesting period. In that case they would aptly express the rule that one-half of such of the yearly dividends which had accrued after the vesting period and previously to one or other of those terms should be paid at such term by the *North British Company*. And they must, in my opinion, receive that interpretation, if it be matter of fair implication from the other enactments of the statute that the *North British Company* was merely to bear its just share, as joint

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owner, of dividends accruing after vesting, and was not to pay by way of premium to the *Caledonian Company* half of a six months dividend which accrued whilst that company had still the sole and exclusive possession of the joint railways.

The controversy between the parties appears to me to turn upon this: whether the words, "the following half-yearly payments," &c., are to be held as referring to payments "accruing" after the vesting period, or to payments which have accrued before but are not exigible until after that period. I prefer the first of these alternatives, because sect. 6, sub-sect. 1, was necessary in order to give effect to that which the Act did certainly contemplate, viz., that after the railways became joint property, the *North British Company* should bear an equal share of the termly payments falling to be made to the original owners and creditors of the railways held by them and the *Caledonian Company* as a condition of their joint occupancy and use of these railways; and because I cannot discern within the four corners of the Act any indication of an intention to give the Appellants a premium in the shape of a moiety of sums which they were bound to pay for their own use of the joint railways.

I therefore agree with your Lordships in thinking that the judgment appealed against ought to be affirmed.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 17th February, 1881.

Agents for Appellants: *Grahames, Wardlaw, & Currey.*
Agent for Respondents: *W. A. Loch.*

[PRIVY COUNCIL.]

HER MAJESTY'S ATTORNEY-GENERAL FOR BRITISH HONDURAS . . . . . } APPELLANT;

AND

JOHN BRISTOWE AND CHARLES THOMSON HUNTER . . . . . } RESPONDENTS.

J. C.*
1880
Nov. 17, 18.

ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

British Honduras—Territorial Sovereignty—Adverse Possession against the Crown.

Held, in an information of intrusion relating to land in *British Honduras*, that the Defendants having shewn sixty years' adverse possession there from before 1817, by themselves and their predecessors in title, without disturbance or effectual claim by the Crown, such information must be dismissed.

Although *British Honduras* was formally declared to be a British Colony, and formally annexed to British dominions by a proclamation of Her Majesty, dated the 12th of May, 1862, yet grants of land having been made therein by the Crown as early as 1817; *held*, overruling the opinion of the Supreme Court, that the territorial sovereignty of the Crown must be deemed to have been acquired in or before that year.

APPEAL from an order of the Supreme Court of *British Honduras* (30 Dec. 1878), in favour of the Respondents in an *ex officio* information of intrusion brought against them on the 1st of October, 1878, by the Appellant on behalf of Her Majesty.

The facts of the case appear in the judgment of their Lordships.

The Solicitor-General (Sir *F. Herschell*, Q.C.), and Mr. *Beaumont*, for the Appellant, contended that on the evidence the lands claimed in the information clearly formed part of the ungranted Crown lands belonging to Her Majesty.

The judgment of the Chief Justice proceeded in part upon the ground that full territorial sovereignty had not been acquired by the Crown till 1862. But in 1798 the Government of *Honduras*

* *Present*:—SIR JAMES W. COLVILE, SIR MONTAGUE SMITH, and SIR ROBERT P. COLLIER.

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was assumed by Her Majesty's predecessor, who at that date repelled the forces of the King of *Spain*, and shortly afterwards exercised such acts of sovereignty as occasion required. Royal proclamations were issued, and from 1807 justice was administered in the name of the King, and from 1817 Crown lands were granted by the superintendent on behalf of the Crown. The right of the Crown to the possession of ungranted lands is clear, except as against such occupiers as can establish an adverse possession of sixty years by themselves or their predecessors in title. The Respondents have not proved such possession. Nor was there any proof or legal presumption of a location or grant under the usages which obtained with respect to wood-cutting privileges before the British sovereignty was established, so as to afford to the Respondents protection under the Ordinances cited in case of undisturbed possession since the 7th of January, 1840, or the 1st of January, 1837, as the case may be.

Moreover such presumption could not arise from casual acts of various persons since 1840, shewn not to be referable to any title. A grant cannot be presumed upon any evidence after it has been disproved: *Goodtitle* v. *Baldwin* (1). Whatever title *Grant* had from the Spanish Crown was determined by his expulsion from Spanish territory. His will, too, was inoperative to leave real estate under Spanish law; and could not pass a "mahogany work" as claimed, for none existed at the date of his death (September, 1783).

Reference was made to the *Burnaby* Code (1765 to 1808), the Colonial Ordinance, 18 Vict. c. 22, articles 2, 3; 22 Vict. c. 19; Crown Lands Ordinance, 1872, sec. 58; Treaty of the 10th of Feb. 1763, art. 17; Treaty of *Versailles*, 1783; Treaty of *London*, 1786; *Clarke's* Colonial Law, p. 327; *Hertzlet's* Treaties, vol. ii. p. 235.

Mr. *Bristowe*, Q.C., and Mr. *Leach*, for the Respondents, contended that the evidence proved adverse possession by the Respondents and their predecessors of the lands in question for more than sixty years. The Crown's claim to this land, so far as it is based upon the Crown Lands Ordinance, 1872, s. 58, failed,

(1) 11 East, 488.

because first, the requirements of that section are not shewn to have been complied with; and second, the section does not apply to lands of the kind in question. Further, there was sufficient evidence of a location or grant prior to 1817, as required by sect. 35 of that Ordinance; otherwise upon the case made, such grant or location will be presumed. The Appellant's claim under sect. 35 was subject to all objections which might be taken to the claim of any ordinary suitors, the Crown not being exempted from the operation of the Statutes of Limitation. As to the nature of the right and title acquired by the Respondents against the Crown, there is no instance on record where the Sovereign of *England*, having assumed the territorial dominion over a colony, has ever attempted to oust the rights of private individuals acquired by long possession and long industrial occupation: see *Dana's Wheaton's* Int. Law, note to § 347. As to presuming a location, reference was made to *Mayor of Kingston-upon-Hull* v. *Horner* (1); *Eldridge* v. *Knott and Others* (2); *Goodtitle* v. *Baldwin* (3); *Roe* d. *Johnson and Others* v. *Ireland* (4); *Attorney-General* v. *Lord Hotham* (5); *Gibson* v. *Clark* (6); *Wilson* v. *Allen* (7).

Mr. *Beaumont* replied, citing *Culley* v. *Doe* d. *Taylerson* (8); *Doe* d. *Daniel* v. *Woodroffe* (9).

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal arises in the case of an Information of Intrusion filed by the Attorney-General of the colony of *British Honduras* to oust the two Defendants, Mr. *Hunter* and Mr. *Bristowe*, from a tract of land in the colony which has acquired the name of "*Grant's Work*," and is so called in the information. The information alleged that the Queen was seised of the land in right of Her Crown, and that the Defendant *Bristowe* had claimed pos-

(1) 1 Cowp. 102.
(2) Ibid. 214.
(3) 11 East, 488.
(4) Ibid. 280.
(5) 1 T. & R. 218.
(6) 1 Jac. & W. 159.
(7) Ibid. 619.
(8) 11 Ad. & E. p. 1008.
(9) 15 M. & W. 792; 2 H. L. 811.

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session under a conveyance made to him in 1870, and had subsequently conveyed the land to the Defendant *Hunter*. The answer to the Defendants denied the title of the Crown, and also alleged a title derived from the devisees of the will of one *James Grant*, which had passed to *Bristowe*, and from him to *Hunter*.

In the view their Lordships take of the case it will not be necessary to go into a wide field of discussion. It will, however, be necessary before stating the facts relating to the land in dispute, to make a short reference to the history of the colony.

The country which now forms *British Honduras* was one of the Spanish possessions in *America*, and formed part of the province of *Yucatan*. It does not appear to have been inhabited by the Spaniards; but the English, principally from *Jamaica*, resorted to it for the purpose of cutting the valuable woods which its forests contained. They began to settle in *Honduras* for this purpose about the year 1759, and it seems they erected a fort there. Soon afterwards war broke out between *England* and *Spain*, and the treaty of 1763 made on the conclusion of it contained the following provision with respect to *Honduras*. The 17th section of the treaty is as follows: "His Britannic Majesty shall cause to be demolished all the fortifications which his subjects shall have erected in the *Bay of Honduras* and other places in the territory of *Spain* in that part of the world four months after the ratification of the present treaty, and His Catholic Majesty shall not permit His Britannic Majesty's subjects or their workmen to be disturbed or molested under any pretence whatsoever in the said places in their occupation of cutting, loading, and carrying away logwood, and for this purpose they may build without hindrance and occupy without interruption the houses and magazines which are necessary for them, for their families, and for their effects; and His Catholic Majesty assures to them by this Article the full enjoyment of those advantages and powers on the Spanish coasts and territories as above stipulated immediately after the ratification of the present treaty." In 1779 another war between *England* and *Spain* arose, and the English settlers were driven from *Honduras* and retired to the *Mosquito* coast. At the conclusion of that war these settlers appear to have returned to *Honduras;* and the *Treaty of Versailles*, of the 3rd of September,

1783, contained, amongst other things which it is not necessary to quote, this stipulation with regard to the cutting of logwood: "Commissaires on either side shall fix on convenient places in the territory above marked out, in order that His Britannic Majesty's subjects employed in the felling of logwood may without interruption build thereon houses and magazines necessary for themselves, their families and effects; and His Catholic Majesty assures to them the enjoyment of all that is expressed in this present Article, provided that these stipulations shall not be considered as derogating in anywise from his rights of sovereignty."

The last treaty between the two countries relating to *Honduras* is the *Treaty of London* of 1786, which enlarged the privileges of the English settlers, the 3rd section of which is as follows: "Although no other advantages have hitherto been in question except that of cutting wood for dyeing, yet His Catholic Majesty, as a greater proof of his disposition to oblige the King of *Great Britain*, will grant to the English the liberty of cutting all other wood, without even excepting mahogany, as well as gathering all the fruits or produce of the earth, purely natural and uncultivated, which may, besides being carried away in their natural state, become an object of utility or of commerce, whether for food or for manufactures; but it is expressly agreed that this stipulation is never to be used as a pretext for establishing in that country any plantation of sugar, coffee, cocoa, or other like articles, or any fabric or manufacture by means of mills or other machines whatsoever (this restriction, however, does not regard the use of saw-mills for cutting or otherwise preparing the wood); since, all the lands in question being indisputably acknowledged to belong of right to the Crown of *Spain*, no settlements of that kind or the population which would follow could be allowed." This treaty considerably enlarged the privileges of the English settlers, for, whereas the privilege granted by the former treaties was confined to the cutting of logwood only, this last treaty conferred upon them the liberty of cutting all woods, not excepting mahogany, and of taking all the natural products of the soil.

We now come to an important period, namely, the year 1798. In that year, during the war which commenced in 1796, an attack was made by the Spanish forces on the English settlers, which

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was repulsed, and the Spaniards withdrew from the territory. There appears to be no trace of their having re-occupied it. Down to this time the sovereignty of the territory had undoubtedly remained in the Crown of *Spain*; but no future attempt was made by the Spanish Crown to restore its authority, and its dominion seems to have been tacitly abandoned. The exact time when the Spanish Government can be said to have finally relinquished the territory, and the time when the British Crown assumed territorial sovereignty over it, are, as the Solicitor-General, who argued the case for the Crown, admitted, both undefined. There certainly seems to have been an interval between the abandonment of Spanish and the assumption of British sovereignty, though the length of that interval cannot be determined.

During the time when the country was unquestionably under Spanish dominion, a superintendent was appointed by the English Crown. Various powers were also conferred by it upon the English settlers, and amongst them the right of granting probate of testamentary documents. The country was formally declared to be a British colony, and formally annexed to the British dominions, by a proclamation of Her Majesty, dated on the 12th of May, 1862. The learned Chief Justice was of opinion that the Crown had not acquired or assumed territorial sovereignty in *Honduras* until this date. Their Lordships cannot concur in this view. Without going into the various acts previously done or exercised by the Crown with regard to this colony, or attempting to fix the precise date when the territorial sovereignty was first assumed, it is sufficient for the decision of this case to say that the fact, which is fully established, that grants of lands were made by the Crown as early as the year 1817, affords ample evidence that in that year at least the Crown had assumed territorial dominion in *Honduras*.

The facts which more immediately relate to the land in dispute may now be referred to. It seems that the early settlers were governed by rules passed by assemblies of the whole body, and that magistrates were elected to enforce the observance of these rules, and generally to administer justice. Amongst those rules were regulations for allotting plots of land to the settlers, which acquired the name of "locations." A compilation called the

"*Burnaby* laws" contains a series of rules regulating these locations, which, amongst other things, provide that they shall be recorded. In the view their Lordships take of this case they do not think it necessary, for the purpose of their decision, to enter upon a discussion of this code. "*Grant's Work*" no doubt had its origin in what was called by the settlers a location—whether originally made in conformity with *Burnaby's* code or not—which belonged to one *James Grant*. There can be no doubt, upon the evidence and the findings of the Chief Justice, that *Grant* had an allotment of land with defined boundaries—whether properly called a location or not—on which he exercised the right of cutting logwood, which at the time when *Grant* lived was the only right which the Spanish authorities had allowed. The fact that *Grant* had a number of slaves belonging to him affords a strong presumption that he had a location, for in his time cutting timber was the only occupation in which slaves could have been employed in *Honduras*.

Grant's will is dated on the 30th of January, 1779. It is headed "*Bay Honduras*," and *Grant* is described as "of the aforesaid Bay, gentleman." After referring to the iniquity of slavery, and the gift of several legacies, the will contains this passage: "And as my negroes have behaved faithfully to me, I therefore immediately after my decease do manumit and set every one of them, their issue, offspring, and increase, free from all manner of labour or service whatsoever, yet subject to the aforesaid legacies, which I think may be paid and discharged in four years after my decease; and in order to enable them to pay off the same I leave them and their heirs and assigns all my effects, of what kind soever, I may have in the *Bay Honduras*, money in *Great Britain* or elsewhere (my lands and effects in *Jamaica* excepted)." It has been argued that the word "effects" would not carry "*Grant's Work*," if that were to be treated as landed property, and further that, the testator himself not having mentioned the "*Work*," it may be presumed that it was not intended to pass by the will. Their Lordships think that the word "effects" would pass land; and that word is certainly sufficient to pass that which at the time he made his will *Grant* alone had, namely, the privilege under the treaty with the Spanish Government of cutting logwood

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on a definite piece of land which, under some arrangement with his brother settlers, had been allotted to him. As to his intention to give the "*Work*" to his slaves, the whole contents of the will leave no room for doubt. Then the will goes on, "And as no community can subsist without regulations, I would have the following to be strictly kept." The will then contains various regulations for the government of the slaves as a community, to many of which it is not necessary to refer; but the following bear upon the questions which arise for decision: "And in order that no difference may arise who shall command, it is my will and desire that *Joseph*, known by the name of *Cudjoe*, do command for life, with the assistance of *Scotland*, who commands after him, and upon any emergencies to take the advice of *Charles*, *Billy*, *Guy*, *Prince*, *Devonshire*, and *Cuffie*, who are to have the command in succession on the like plan with *Joseph*, and after their decease *Dick*, *Will*, *George*, *Daniel*, and so on, in seniority of those born in the community; but that no tax or cess be laid but by the consent of fathers of families and housekeepers, and that he or they so commanding shall not arrogate a power to impose on any person in the community, it being his or their business to see the laws and regulations duly executed, and to use means for the welfare and protection of the community." The testator evidently intended to devise to his slaves this "*Work*," whatever may have been its character at that time, to be enjoyed by them as a community under the regulations which he laid down by his will. This of course created a very peculiar state of things, but the bequest could perfectly take effect as a bequest to the persons who were his slaves, and then formed the community; and it seems to have been considered, when the estate was sold to Mr. *Bristowe* in 1870, that the bequest had been to them as joint tenants.

Soon after the date of this will, the settlers, and amongst them *Grant*, were driven from *Honduras* by the Spaniards, and consequently the possession of any "Works" they may have had was for the time lost, and the privileges which they had hitherto enjoyed were for the time put an end to. The settlers, however, appear to have returned to *Honduras* in 1783, about the time of the Treaty of *Versailles*, which has been already referred to.

What took place immediately after their return must remain in some obscurity, the time being beyond the memory of any living persons. It appears, however, that *Grant* made a second will whilst he was absent on the Mosquito coast, and a question arose whether that will, or the prior will of 1779, should be treated as his true will and testament. The matter was determined in 1794, by the magistrates of the settlement in favour of the first will, that of 1779, and their decision is recorded in one of the documents which have been given in evidence in this case. It appears to have been decided on the petition of *Cudjoe*, the man named in the will as the first ruler, and of *Scotland*, who was to command after him. The minute or record states as follows:—"Read the petition of *Cudjoe* and *Scotland*, two negro men, on behalf of themselves, their families, and all the negro and other families of colour of the late *James Grant*, deceased; the renunciation of *James Bartlet*, Esq.,"—one of the executors; "the answer given to the said petition by the magistrates, at November Quarterly Court, 1793; the will and testament of the said *James Grant*, made the 30th of January, 1779, proved by *Thomas Potts*, Esq., in which probate, it having been observed that the word 'seen' was omitted, it was interlined, and Mr. *Potts* again sworn to the same; likewise the will and testament of the said *James Grant*, made the 9th of September, 1783, and the affidavit of *James Blinshall*, when the affidavits of *Thomas Potts*, *James Bartlet*, Esqs., *Gerald Fitzgibbon*, and *William Mucklehany* were severally taken: it was then resolved unanimously, That from the before-mentioned affidavits, and the will made the 30th of January, 1779, being sufficiently proved, that the said will be considered as the real last and true will and testament of *James Grant*, deceased, and that every part thereof, so far as the situation of this settlement will admit of, be put in force; for which purpose the magistrates appoint *Richard Hoare* and *Thomas Potts*, Esq., as trustees for the same estate (*James Bartlet*, Esq., one of the executors named in the said will, having in public Court renounced his right as executor aforesaid, and disclaimed all right to act therein either as an executor or as a trustee, and the other executor named in the said will being dead). The said trustees to have full power and authority to examine into the situation of the said estate, to

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call all and every person concerned to an account for their intromissions with the estate, and to inspect into the situation of the negroes, and in every respect to act in such manner as may appear best for the general good of the said estate." What was "the estate" referred to? It seems to their Lordships that it could have been no other than the only immovable property the testator had, or could at that time have had, in *Honduras*, viz., "*Grant's Work*." That was the property upon which the slaves had been employed, and which, as, devisees, they, according to the evidence, subsequently in fact occupied.

As far back as living memory can be carried, there is evidence that some of those forming the group of devisees occupied "*Grant's Work*," and there is no evidence whatever that any other person enjoyed or occupied or in any way interfered with the land. At the time when the decision was given in 1794 the only right which the manumitted slaves, the devisees, could have exercised with any shew of title was the right to cut wood and to take the natural products of the soil; but after the final retreat of the Spaniards in 1798 the strong presumption is, that the devisees who were then actually upon the land would proceed to occupy and cultivate it, and to treat it, for all purposes, as their own. After the retirement of the Spaniards there would be no one to interfere with them, for the British Crown had not at that time assumed territorial sovereignty. The strong probability therefore is, that those who were placed in the advantageous position of holding, as "a location," a definite piece of land, would not confine themselves to the limited privilege allowed by the Spaniards, and would enter upon full possession and enjoyment of the land. The evidence appears to be in accordance with the obvious probability. It goes back nearly to the time when the will was established in 1794, and to the time when the Spaniards left in 1798. The Chief Justice, who tried the cause, by the consent of the parties was to act as a jury and decide the questions of fact as well as of law which arose in the case. His note is that the evidence of the old witnesses was so clear and trustworthy that the parties left the questions of fact to him. The inferences which the learned Judge drew from the evidence will be referred to afterwards; but it will be well to advert, though shortly, to some of the witnesses. A

witness whose testimony is entitled to great weight, *Clashmore Lawless*, an old mahogany cutter, who said that he was upwards of ninety years old, states:—"I remember old *Cudjoe*,"—the first ruler mentioned in the will;—"he is dead long ago. He was the first ruler on '*Grant's Work*' and lived at the *Bluff*." It has been objected at the Bar that there is not sufficient evidence that this "*Bluff*" was part of "*Grant's Work*"; but their Lordships cannot give effect to this objection. The limits of the "*Work*" are described in the information. The trial was conducted upon the assumption that it was a definite piece of land which both parties understood, and upon the boundaries of which there was no dispute. There is not a word in the evidence to shew that there was any dispute as to boundaries, and it cannot be supposed that the learned Judge would have taken down evidence with regard to the "*Bluff*" if it had not been within what was understood to be "*Grant's Work*." The witness says, "I saw the wood piled up there. I knew *Scotland Grant* too, and *Samuel Grant*, and I knew *Mary Grant* also. They are all dead. I know *Grant's Creek* and *Nancy Peny Creek*." Then he says he was fifteen years old when the battle of *St. George's Kaye* (1798) was fought, "which I remember. I know that old *James Grant* was the 'master,' but I did not know him personally." This witness was of an age which would enable him to know what he states, that the first ruler of "*Grant's Work*" lived at the *Bluff*. Thus a possession under the will of *James Grant* is proved at a very early date, and soon after the decision establishing it. Then a number of old witnesses are called, most of them on the part of the Crown, whose evidence is to the effect that the devisees and their descendants and families exercised various acts of ownership upon the land, not confined to the cutting of wood; there was a large quarry the stones of which were quarried by them or by persons who had their authority to take them, and they received money for the permission granted. There seems to be no doubt that these persons were occupying and enjoying this land and treating themselves as the owners of it, and certainly without anyone interfering with them. Their occupation appears to have continued down to 1870, when the conveyance was made to the Defendant *Bristowe*. The grantors in this conveyance were *Mary Collins*, whose maiden

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name was *Grant*, a woman nearly a hundred years old, who is stated to be the last survivor of the original devisees under *Grant's* will, and some descendants of the other devisees.

Then there is the important evidence of the Crown surveyor, Mr. *Faber*, who in 1862 went over a great part of the colony and made a map. He says: "I am the late Crown surveyor. I produce this copy of a map. It is a traced copy of my own original map made in 1862 delineating all the private property in the colony. The property of private individuals is uncoloured. The property of the Crown is green. The property of Messrs. *Toledo & Co.* is blue, and the property of the *Belize Estate and Produce Company* is red." Then there is this note of the Judge: "The map is put in and marked C. (the witness, being called upon, points out '*Grant's Work*' on his map, which '*Grant's Work*' is uncoloured, as being the property of a private individual and not the property of the Crown)." That is a significant fact. It is not at all conclusive against the title of the Crown, but it distinctly shews that at that time the land was occupied by persons who claimed to hold it as private property. The explanation given by the surveyor upon his further examination was, "I made inquiries and found that it all hinged upon old *Grant's* will." It is plain from that evidence that the claim made by the persons who were then occupying was a claim to hold under *Grant's* will: "I knew the upper boundary, but not the extent. I left it uncoloured because it was not decided." The Crown apparently had not decided at that time to treat "*Grant's Work*" as Crown land, and so he left it uncoloured in the same way as he left all land occupied by private persons. Therefore the evidence of the surveyor, though not affecting the Crown as regards the title, which is not within his province, is distinct, as has been already observed, to shew that the occupation was then held by persons claiming to hold as private owners. These persons claimed title under *Grant's* will, on which, as he says, he understood the whole question turned.

It is to be observed that there is no opposing evidence. There is not the slightest trace of any persons other than those claiming under *Grant's* will exercising any act of ownership over this property, or of the Crown making any claim to it.

Their Lordships, even if they had not come to the same conclusion, would have been extremely reluctant to differ from the view which the learned Judge, deciding as a jury, has taken of the evidence. His second finding is "that after the death of the said *James Grant*, his devisees, under the captaincy of one of their number named *Cudjoe*, entered into possession as joint tenants of the property so bequeathed to them by the testator." His further finding, the fifth, is: "That by the relinquishment on the part of *Spain* of all exercise or assertion of dominion within the settlement of *Honduras*, the qualified rights of the settlers, as they existed under the treaties above mentioned, were, by virtue of continued occupancy and long industrial possession, converted into and became merged in the higher and more ample title of estates in fee simple; and as such they were regarded and dealt with by the inhabitants in public meeting assembled." It may be that it is not technically accurate to say that the qualified rights were merged in the higher and more ample title of estates in fee simple; but the expression clearly indicates the view of the Chief Justice that the devisees had acquired the absolute ownership of the land, and gives force to his finding as to the possession, and long-continued occupancy, of these persons.

Assuming then the conclusion of fact to be established, as their Lordships think it is, that, in the interval which elapsed between the retirement of the Spaniards in 1798 and the assumption of territorial sovereignty by the British Crown, full possession of the land had been taken by the devisees, and that such possession had been continued by them and their assignees down to the date of the filing of the information, it becomes unnecessary to determine the question whether the devisees, at the time when the British Crown annexed the territory, had acquired a title to the land by first occupancy or otherwise, which the Crown was bound to recognise. Their Lordships are by no means prepared to say that such a title has not been shewn, but they think it unnecessary so to decide, because the facts, as proved and found, establish adverse possession against the Crown for a period exceeding sixty years; namely, a possession commencing before 1817, in or before which period the Crown had certainly assumed territorial sovereignty in *Honduras*, and continued without dis-

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turbance or effectual claim by the Crown, down to the period of the filing of the information.

The ground on which their Lordships' decision had been placed renders it immaterial to consider the effect of the Ordinances of the 18th Vict. c. 22, and 22 Vict. c. 19, and the Crown Lands Ordinance of 1872; though they are by no means satisfied that a location, such as is meant by the 35th section of the Ordinance of 1872, might not be presumed, which would entitle the Respondents to the benefit of that remedial law.

On the whole case their Lordships are of opinion that this appeal fails, and they must humbly advise Her Majesty to affirm the judgment of the Supreme Court of *Honduras* and to dismiss the appeal with costs.

Solicitors for appellant: *Bircham & Co.*
Solicitors for respondents: *Parker & Co.*

[PRIVY COUNCIL.]

J. C.* 1880 *Nov.* 25, 26,

SIMMONS . . . . . APPELLANT;

AND

MITCHELL . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE WINDWARD ISLANDS (GRENADA).

Pleading—Action for Slander—Innuendoes—Prefatory Averment.

Words merely conveying suspicion will not sustain an action for slander.

Where such words admit fairly, and in their natural sense, of two meanings, the one being an imputation of suspicion only, the other of guilt, the sense in which they were uttered should be left to the jury.

The innuendoes not declaring that the words were spoken with the intention of imputing to the Plaintiff a felony, and not importing to enlarge the meaning of those words:—

Held, that the prefatory averments which only professed to give the motives of the defendant could not be substituted for those innuendoes whereby the Plaintiff undertook to give the meaning of the words spoken.

APPEAL from a judgment of the Court of Appeal for the *Windward Islands* (Oct. 27, 1879), dismissing an appeal from a

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

judgment of the Supreme Court (Civil Jurisdiction) of *Grenada* (May 27, 1879), discharging with costs a rule *nisi* for a new trial which had been obtained by the Appellant in an action brought by him against the Respondent.

The pleadings and facts are set forth in their Lordships' judgment.

Mr. *J. D. Fitzgerald*, for the Respondent, raised the preliminary objection that the appeal had lapsed, and that no order for special leave had been made, the Appellant's petition for that purpose having been ordered to stand over till the hearing. He relied on the Order in Council of the 3rd of May, 1859, constituting the Court of Appeal for the *Windward Islands*, which provides for appeals to Her Majesty in Council "from any final judgment, decree, order, or sentence of the said Court of Appeal . . . in case any such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue, above the amount or value of £300 sterling, or in case such judgment, decree, order, or sentence shall involve, directly or indirectly, any claim, demand, or question to or respecting property in any civil right amounting to or of the value of £300 sterling. . . . And that in all cases security shall also be given by the party or parties appellant in a bond or mortgage, or personal recognizance, not exceeding the value of £500, for the prosecution of the appeal and for the payment of all such costs as may be awarded to the party or parties respondent, and that such security be completed within twenty-eight days from the date of the motion or petition for leave to appeal; and the party or parties appellant shall then, and not otherwise, be at liberty to prefer and prosecute his, her, or their appeal." He contended that the present case was within the words of the Order in Council, the declaration having claimed £5000 damages, that no special leave to appeal was necessary, and that security for costs not having been given within twenty-eight days, or at all, as required by the Order in Council, the appeal had lapsed. He further contended that no special leave ought now to be given, the petition for special leave having been presented on the ground that the case was not within the Order in Council, and the fact that no security for costs had been given

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not having been stated to their Lordships at the time. He cited *Sibnarain Ghose* v. *Hullodher Doss* (1); *Bulkeley* v. *Scutz* (2).

Mr. *J. McLeod*, for the Appellant, contended the case was not within the Order in Council, it being an action of tort, and the claim for damages in the declaration not being "a matter at issue"; and that even if the case were within the Order in Council, special leave ought then to be given, security having been lodged in the registry since the presentation of the petition for special leave. He then cited *Mayor* v. *Burgess* (3).

SIR ROBERT P. COLLIER:—

Their Lordships are of opinion that the case is within the Order in Council, and that security for costs ought to have been given within twenty-eight days from the date of the motion for leave to appeal in the Court below, but as they think a *bonâ fide* mistake was made by the Appellant, they will now give special leave to appeal.

Mr. *Meadows White*, Q.C., and Mr. *J. McLeod*, for the Appellant, contended that the words alleged in the declaration and proved at the trial, were not words of mere suspicion, but that the natural meaning of them was to impute the guilt of murder to the Appellant. The intention of the Respondent in using them was a question for the jury. The question of the meaning was a question for the jury, and ought to have been submitted to them. The innuendoes were immaterial in this case: see *Common Law Procedure Act*, 1852, s. 61; Rules Trinity Term, 1853, r. 16. Reference was made to *Watkin* v. *Hall* (4); *Hart* v. *Wall* (5). The words used reasonably bore the construction put upon them by the Appellant, and a reasonable man to whom they were addressed would infer liability to an indictment for murder. [SIR MONTAGUE E. SMITH:—The Judge must decide if the words are reasonably capable of two meanings; if he so decide, the jury must determine which of the two meanings was intended.] Reference was made

(1) 9 Moo. P. C. 354.
(2) 6 Moo. P. C. (N.S.) 481.
(3) 24 L. T. (N.S.) Q. B. 67.
(4) Law Rep. 3 Q. B. 402.
(5) 2 C. P. D. 146.

to *Hunt* v. *Goodlake* (1); *Sturt* v. *Blagg* (2); *Mulligan* v. *Cole* (3); *Heming* v. *Tower* (4); *Tozer* v. *Mashford* (5); *Folkard's* Treatise on Slander, p. 93; *Tempest* v. *Chambers* (6); *Padmore* v. *Lawrence* (7).

Mr. *J. D. Fitzgerald*, for the Respondent, contended that the words used amounted at most to words of mere suspicion, and did not convey any positive or absolute imputation or charge of an indictable offence. Reference was made to 2 Selw. N. P. 1200; *Snag* v. *Gee* (8); *Jackson* v. *Adams* (9); *Harrison* v. *King* (10); *Tozer* v. *Mashford* (5). No prefatory statement is now necessary, only an innuendo. If an innuendo is necessary at all, as it is in this case, it must be used, the *Common Law Procedure Act* has made no difference. Where it is not wanted it can be rejected, but where necessary its absence or insufficiency is fatal. Reference was made to *Common Law Procedure Act*, 1852, s. 61; *Chitty* on Pleadings, vol. i. pp. 415, 422 [7th Ed.]; *Rawlings* v. *Norbury* (11); *Cox* v. *Cooper* (12). The words do not naturally impute an indictable offence, and are not actionable *per se*, and therefore no innuendo would make them so. Words are *primâ facie* to be construed according to their ordinary sense: *Hankinson* v. *Bilby* (13); *Daines* v. *Hartley* (14); *Capital and Counties Bank* v. *Henty* (15). Even if there were a scintilla of evidence to go to the jury, a new trial would not be ordered unless on the evidence there should have been a different result. The Defendant, under the circumstances, was entitled to one month's written notice of action: see *Grenada Act*, No. 148. The declaration alleged that the Respondent was acting as clerk of the Crown, and therefore he was a public officer within the meaning of the Act. [SIR BARNES PEACOCK:—The words were not spoken or the act done in his capacity of clerk to the Crown.]

(1) 43 L. J. (N.S.) C. P. 54.
(2) 10 Q. B. (N.S.) 906.
(3) Law Rep. 10 Q. B. 549; 44 L. J. (Q.B.) (N. S.) 153.
(4) 10 M. & W. 564, 569.
(5) 6 Ex. 539; 20 L. J. (N. S.) (Ex.) 225.
(6) 1 Stark. 67.
(7) 11 Ad. & E. 380.
(8) 4 Rep. 16 a.
(9) 2 Bing. N. C. 402.
(10) 4 Price, 46.
(11) 1 F. & F. 341.
(12) 12 W. R. 75.
(13) 11 M. & W. 442.
(14) 3 Ex. 200.
(15) 28 W. R. 851.

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Mr. *White* replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case an action for slander was brought by Mr. *Charles Simmons*, the Appellant, against Mr. *Mitchell*, the Respondent, in the Supreme Court of *Grenada*. The Chief Justice, who tried the case, having offered the Plaintiff a non-suit, which he declined, directed the jury to find a verdict for the Defendant. A rule having been granted to shew cause why that verdict for the Defendant should not be set aside and a new trial had, the Chief Justice adhered to his ruling and discharged the rule. Whereupon there was an appeal to the Appellate Court of the *Windward Islands*, consisting of four Chief Justices. The Appellate Court was equally divided, and therefore the judgment of the Chief Justice stood discharging the rule for a new trial. These are the circumstances under which this appeal comes before their Lordships.

The declaration was in respect of words alleged to be slanderous uttered by the Defendant, *Samuel Mitchell*, who is described as the clerk of the Crown, and having reference to the Plaintiff, who is a merchant in *Grenada*. The declaration contains a prefatory statement that the Defendant, "being clerk of the Crown, and, as such, having the control and custody of depositions and other proceedings taken at the inquisitions of coroners in and for the said island of *Grenada*, and contriving and intending to injure the Plaintiff, and to cause it to be believed that he had been guilty of murder, and to subject him to the pains and penalties by the law made and provided against and inflicted upon persons guilty thereof," used the words complained of. The declaration contains four counts, and this prefatory averment is applicable to each of them. The words set out in the first count are these: "'People who go to the Secretary of State had better see that their characters are clear, for your brother' (meaning the Plaintiff)"—the words being addressed to the brother of the Plaintiff—"'lies here' (meaning the office or place of business of the Colonial Secretary of the said island and clerk of the Crown) 'under suspicion of having murdered a man named *Emanuel Vancrossen* at the *Spout* some years ago'"—and this is the innuendo—"meaning thereby that there was among the records of the said clerk of the

Crown some documentary evidence or charge implicating the Plaintiff with the murder of the said *Emanuel Vancrossen* at the *Spout*, and which warranted the Defendant in saying so." The second count alleges the use of the same words with a somewhat different innuendo, the innuendo being, "meaning thereby that there was some evidence in the said office of clerk of the Crown that the Plaintiff had murdered *Vancrossen*." The third count alleges the speaking of these words: "'Haven't you' (meaning the person with whom the Defendant then conversed) 'heard that *Charles Simmons*' (meaning the Plaintiff) 'is suspected of having murdered one *Vancrossen*, his brother-in-law? A proclamation offering a reward for the apprehension of the murderer is now in my office' (meaning the office of clerk of the Crown), 'and there is only one link wanting to complete the case'"—and the innuendo is in these terms, "meaning thereby that there was some evidence in the office of clerk of the Crown, and that there was required only one link in the chain of such evidence to put the Plaintiff upon his trial for the alleged murder of the said *Emanuel Vancrossen*." There is a fourth count alleging the speaking of these words: "'Some years ago *Emanuel Vancrossen* was murdered, and his body was found at *American Point*' (meaning a place usually known as the *Spout*, situate on the northern shore of the lagoon adjacent to the town of *Saint George*, in *Grenada* aforesaid). And upon being asked the question, 'What about it?' by the person with whom the Defendant then conversed, the Defendant then answered, '*Charles Simmons* was the person suspected of having committed the deed' (meaning the murder of the said *Emmanuel Vancrossen*). 'I (meaning the Defendant) 'have spoken to *Orgias* and *Sheriff*'"—meaning the doctor and the Attorney-General of the island—"'about it.'" Such is the declaration, to which the plea is "Not guilty," only.

It is to be observed that the Plaintiff does not in any of his innuendoes declare that the words of which he complains were spoken with the intention of imputing to him a felony; that is to say, the crime of murder. The innuendoes do not purport to enlarge the meaning of the words, and if the words themselves convey only suspicion the innuendoes do no more.

It has been argued on behalf of the Defendant that since the

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Common Law Procedure Act, s. 61, has been passed, these innuendoes may be rejected and the prefatory averments may be substituted for them and treated as the real innuendoes; that is to say, that the prefatory words in the present case, "contriving to cause it to be believed that the Plaintiff had been guilty of murder," may be treated as explaining the meaning of the slanderous words set out in each of the counts. But their Lordships think that, there being innuendoes in the declaration whereby the Plaintiff undertakes to explain the meaning of the words spoken, he cannot substitute for them a prefatory averment which does not profess to give the meaning of the words spoken, but only the motives of the Defendant.

But it has been further argued that these innuendoes may now be all rejected, and the declaration may be treated as if it contained none; and that being so, that the words complained of in the declaration are capable of two meanings in their fair construction: one, that the Defendant meant that the Plaintiff was suspected of having committed a felony; the other, that he had committed the felony, and therefore that the question of their true meaning ought to have been left to the jury. It has not been disputed that in point of law words merely conveying suspicion will not sustain an action for slander.

With respect to the first, second, and fourth counts, their Lordships have had no difficulty. The words in those counts convey in their natural and ordinary sense suspicion, and suspicion only, and, according to the law of this country, with respect to the policy of which we have nothing to do, would not support an action of slander. Their Lordships have had more doubt with respect to the third count, wherein it is said that the Defendant used these expressions: "Haven't you heard that *Charles Simmons* is suspected of having murdered one *Vancrossen*, his brother-in-law? A proclamation offering a reward for the apprehension is in our office, and there is only one link wanting to complete the case." It has been argued with some force that these words are capable of bearing the meaning that the Plaintiff is guilty of murder, but that the technical proof against him is not wholly complete. Undoubtedly, if the words had admitted fairly of two meanings, the one being an imputation of suspicion only, the other of guilt, it would have been proper to leave to the jury the sense

in which they were uttered; but their Lordships have come to the conclusion that, taken in their natural sense, and without a forced or strained construction, they do not contain these two meanings, but only one, viz., that there was a case of strong suspicion, but of suspicion only, against the Plaintiff, and are therefore unable to say that the learned Judge was wrong in withdrawing the case from the jury. They have further to observe that, even if the learned Judge had left the case to the jury, a finding of the jury that the words imputed actual guilt would not have been satisfactory, and their Lordships would have deemed it their duty to send the case back for a new trial. Their Lordships observe, indeed, that, according to the judgment of two of the learned Judges, the principal stress in the argument of the counsel of the Plaintiff was laid upon an answer given by *William Simmons*, the brother of the Plaintiff, to a question put to him in cross-examination, that he regarded the words as an imputation of the crime of murder; but their Lordships are of opinion that such a statement by a witness without any proof of surrounding circumstances or conduct leading to the inference which the witness drew that the words had some meaning different from their ordinary meaning, was not evidence on which the jury would have been justified in acting. In the case of *Daines and Braddock* v. *Hartley* (1), it was expressly ruled in the Court of Exchequer that a witness could not be asked with respect to spoken words in a slander case, "What did you understand by those words?"

For these reasons their Lordships are of opinion that the order of the learned Chief Justice discharging the rule for a new trial was right, and they will humbly advise Her Majesty to make that order which the Court of Appeal of *Grenada* ought to have made, that is to say, an order affirming the judgment of the Chief Justice; but, considering all the circumstances of the case, and that the Court of Appeal has given no costs of the appeal, their Lordships are of opinion that in this case the appeal should be dismissed without costs.

Solicitors for the Appellant: *Stocken & Jupp.*
Solicitors for the respondent: *Greig & Meikle.*

(1) 3 Ex. 200.

[PRIVY COUNCIL.]

J. C.* 1880 Nov. 24, 25.

JOHN CLARK . . . . . PLAINTIFF;

AND

G. H. D. ELPHINSTONE AND W. H. ANDERSON . . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon Ordinances, No. 8 *of* 1834, *No.* 22 *of* 1871—*Adverse Possession—Acts of Ownership.*

Ceylon Ordinances No. 8 of 1834, and No. 22 of 1871, require that a Defendant should have had ten years' undisturbed and uninterrupted possession, meaning actual and not ideal possession, of land in dispute in order to be entitled to the benefit of such Ordinances.

Although acts done upon parts of a district of land may be evidence of possession of the whole, yet as regards lands within a disputed boundary acts of ownership by either party outside the boundary are no evidence of title to the lands within it.

APPEAL from a judgment of the Supreme Court (Jan. 25, 1878), ordering that a judgment of the same Court (June 7, 1877), in favour of the Appellant be re-opened, and that a decree of the District Court of *Kandy* (June 7, 1876), be set aside, and the Appellant's suit be dismissed with costs. That suit was brought on the 10th of January, 1876, for a trespass on a certain plot of land described, for damages, and an injunction.

The facts appear in the judgment of their Lordships.

Mr. *Jeune* (Mr. *F. M. White*, Q.C, with him), for the Appellant, contended that on the evidence the disputed plot belonged to the Plaintiff's, and not to the Defendant's, grant; otherwise that the Plaintiff and his predecessors in title had been in undisturbed and uninterrupted possession of the disputed land for ten years within the meaning of *Ceylon* Ordinance 22 of 1871, clause 33; and that

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

there was no evidence that the Defendants and their predecessors had had such possession.

Mr. *Arthur Charles*, Q.C., and Mr. *Lumley Smith*, Q.C. (Mr. *F. G. Templer* with them), for the Respondents, contended that on the evidence the disputed plot was included in the grant to *Elphinstone*; or that on the evidence as to actual possession they had gained a title thereto by prescription; otherwise that there was sufficient evidence of agreement as to boundary to throw the disputed land into the area of the Defendants' estate, and thus to make acts of ownership on other parts of the Defendants' land evidence of constructive possession of the disputed land, or to estop the Plaintiff from claiming it. Reference was made to *Jones* v. *Williams* (1).

Mr. *White*, Q.C., replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The Appellant, who was the Plaintiff in the action, and the Respondents, the Defendants, are the owners of conterminous estates, and the dispute between them relates to a piece of land, containing about fifty-four acres, lying between their two estates. The Plaintiff's estate may be called *Wattagoda* and the Defendant's *Holyrood*, the names which were used in the proceedings below. Both owners derived title under grants from the Crown made in the year 1842. *Wattagoda* was granted to two persons, *Wilson* and *Ritchie*, who in 1844 conveyed to *Johnstone*, and in 1873 *Johnstone* conveyed to the Plaintiff. The grant of *Holyrood* was made by the Crown, on the same day, to *Mackenzie*, who in 1869 conveyed to *Thomson*; and *Thomson*, by two conveyances, in 1870 and 1873, conveyed to the Defendant.

The action was in trespass. The Defendant, besides denying that the piece of land in dispute formed part of the Plaintiff's estate, and asserting that it formed part of his own, set up the defence that he was entitled to hold the land under the provisions of the *Ceylon* Ordinance 22 of 1871, by reason of an undisturbed possession of ten years.

(1) 2 M. & W. 326.

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The first of these questions, that of the title to the piece of land in dispute, arose in consequence of a latent ambiguity in the description of the boundaries of the estates contained in the grants from the Crown. One of the boundaries was a stream called the *Welle Ella;* and upon applying that description to the ground, and to the streams, as they actually existed, a question arose which of two streams was the *Welle Ella* mentioned in the grants, the piece of land in dispute lying between those two streams. The boundary mentioned in the grant of *Wattagoda* is in these terms:—"On the east"—that is, bounded on the east—"by land applied for by Mr. *Ritchie,* and *Welle Ella.*" In the grant of *Holyrood* the western boundary is thus given;—"On the west by the same"—that is, the property of Messrs. *Gibb, Clarke, & Co.*—"and *Welle Ella.*" Plans are attached to both grants, and referred to as giving the true delineation of the estates granted. The lands embraced in both grants were forest and jungle lands. At the time the dispute arose both the Plaintiff and the Defendant had cleared portions of their lands and cultivated them for coffee, but neither had touched the disputed piece of ground, which remained in its original state of forest or jungle.

The action was tried before the district Judge. Evidence was given on the part of the Plaintiff, by surveyors and others, to shew that the stream which was marked for convenience on the map X.A.B. was the *Welle Ella* stream indicated in the grants. On the other side it was contended that the stream which was marked X.Y.Z. was the true boundary; but no surveyors were examined by the Defendant on that point. The Defendant also contended that the evidence shewed that he had had undisturbed possession for ten years. The district Judge found in favour of the Plaintiff on both issues; viz., that the true boundary was the stream marked X.A.B., and that the Defendant had not had possession for ten years within the meaning of the Ordinance. Upon an appeal the Supreme Court held that the District Judge was right in his findings, and affirmed his judgment in favour of the Plaintiff.

The judgment of affirmance was given by the two puisne Judges of the Supreme Court, either in the absence of the Chief Justice or during the vacancy of the office; afterwards, when Chief Justice *Phear* was present, an application was made for a review of this

judgment. A review being granted, and the case reheard, the Court, whilst adhering to the former judgment of the two Judges upon the question of the real boundary, was of opinion that the Defendant had been for ten years in undisturbed possession of the disputed land, and was therefore entitled to the benefit of the Ordinance of 1871, and on that point reversed its former decision and the judgment of the District Judge, and dismissed the Plaintiff's action.

Upon the first question, that of the true boundary, their Lordships entirely agree in the concurrent judgments which have been given. It is not their usual practice to entertain the discussion of a mere question of fact which has been decided by the concurrent judgments of the two Courts below; but in the present case, as the question of fact involved the consideration of the description in the grants, their Lordships have heard the argument upon it. Having done so, they see no reason whatever to dissent from the view which the Courts below have taken, and which the evidence seems entirely to support.

The Plaintiff having thus established that under the grant from the Crown in 1842 the true boundary of the estate granted to *Wilson* and *Ritchie* was the stream marked X.A.B., and consequently his title to the land in dispute, it lies on the Defendant to prove that he had held undisturbed possession of the land for ten years before the action, so that under the Ordinance his possession could not be disturbed by the Plaintiff. Upon that point the Court in Review has decided in his favour, and the only question that was fairly open to argument in the case is whether the Court is right in coming to that decision.

There are two Ordinances, one No. 8 of 1834 and the other No. 22 of 1871. It is indifferent which is taken, for they are in the same terms. The last Ordinance is as follows: "Proof of the undisturbed and uninterrupted possession by a Defendant in any action, or by those under whom he claims, of lands or immovable property by a title adverse to or independent of that of the Claimant or Plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would

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fairly and naturally be inferred), for ten years previous to the bringing of such action, shall entitle the Defendant to a decree in his favour with costs. And in like manner when any Plaintiff shall bring his action or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as hereinbefore explained by such Plaintiff or intervenient, or by those under whom he claims, shall entitle such Plaintiff or intervenient to a decree in his favour with costs."

The grounds of the judgment of the learned Chief Justice, which were substantially acquiesced in by the other two Judges—though it is rather difficult to formulate them, inasmuch as the Chief Justice mixed them together, rather than relied on them separately—appear to be these: first, that a boundary had been agreed upon or established between the parties, and that the establishment of that boundary "must be regarded as an overt act of exclusion." The boundary which he assumes to have been established is the boundary which the Defendant contends for. Then, that the boundary being established, the piece of land in dispute became a part of the entire area of the Defendant's estate, so that acts done on any part of that area would be evidence of the possession of the whole of it. There is another ground indicated in the judgment of the Chief Justice; namely, that the Plaintiff was estopped by his own conduct from now setting up the real boundary. The conclusion of the judgment of the Chief Justice is based upon the Ordinance, but there is no doubt an indication in his observations that he conceived that some estoppel existed in the case by which the Plaintiff was bound; and that point has been formally argued at their Lordships' Bar by the Respondent's counsel.

It is well to see, first, how the learned Chief Justice himself puts the case, and then how far the evidence bears out the assumptions on which his judgment is based. He says: "Unfortunately, it is not made quite clear by the evidence at whose instance it was that these gentlemen went"—that is, the surveyors—"but it seems certain that their results were made known to the owners

for the time being of the two estates, and accepted by them as trustworthy, and as decisive of their mutual boundary relations. The conduct of the owners towards each other in view of these surveys seems to have amounted to an assertion by the one party of right of ownership and exclusive possession up to the line so ascertained, and an acquiescence by the other party in that right. And the establishment of a proprietary boundary line as against a conterminous owner, whether it be by metes and bounds or not, must be regarded as an overt act of exclusion." Assuming that under some circumstances the establishment of a proprietary boundary line might have that effect, their Lordships think that in the present case the conclusions to which the Chief Justice has come are not supported by the evidence. They think the evidence fails to prove the establishment of a boundary line in the sense of an agreement, or of an estoppel binding on the parties. The Chief Justice relies upon a transaction which appears upon the evidence; namely, that Mr. *Hood* pointed out to Captain *Oldfield* the boundary X.Y.Z. as the true boundary. The evidence of what took place is extremely scanty, and fails to sustain that which the learned Chief Justice builds upon it. Captain *Oldfield* says that he went to the land in 1862 with Mr. *Hood*, who pointed out the stream X.Y.Z. as the boundary, and he says he was asked by Mr. *Gibson Thompson* to get the boundary defined. Now if the year is correctly stated, Mr. *Gibson Thompson* had at that time apparently nothing to do with the estate, for he did not become assignee until the year 1869. All that appears about Mr. *Hood* is the statement of the Defendant that he had been for fifteen years superintendent of *Wattagoda*. What is the meaning of superintendent, or whether *Hood* was anything more than farm bailiff, does not appear. It does not appear that the deeds were looked at, nor that *Hood* had authority to make any admission at all on the subject. If therefore it be granted that he and Captain *Oldfield* went upon the ground, and that the boundary spoken of was pointed out, such an act could not bind either of their principals without evidence to shew that these persons were authorized not only to point out the boundary but to agree upon it, and, to use the words of the Chief Justice, to establish it as the boundary between the two estates. It does not appear that anything was

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done in consequence of this transaction. It may be that the estates were about to be sold, but there is no evidence of it. There is no evidence that the supposed agreement as to boundary was communicated to an intending purchaser, though, possibly, Mr. *Gibson Thompson* may have at the time intended to purchase the estate.

There is evidence that a survey was made by Mr. *Noad*, a Government surveyor, in the year 1856, and in it the boundary of the two estates was marked as X.Y.Z. Nothing appears to have been done upon that survey; but it no doubt became known. It was not, however, acquiesced in, and a question having arisen in 1869 whether it was correct, Mr. *Noad* was again sent to the ground to re-survey it. It is true that he adhered to his original plan; but at the same time a Mr. *Toogood*, a private surveyor employed on the part of those interested in *Wattagoda*, also surveyed the ground; and he was of opinion that the stream X.A.B. was the true boundary. It is very unlikely that the owners of this estate, when furnished with this opinion, would have assented to the other boundary.

Their Lordships therefore think that there is no sufficient evidence of the establishment by agreement of a defined boundary which would operate to throw the piece of land in dispute into the area of the Defendant's estate, so as to make acts done on other parts of the estate evidence of the possession of this part.

It has been argued at the Bar, that, even if the evidence fails to shew that the boundary had been established, acts done upon other parts of the land granted to the predecessors of the Defendant are evidence of acts done on this land. There is no doubt that in many cases acts done upon parts of a district of land may be evidence of the possession of the whole. If a large field is surrounded by hedges, acts done in one part of it would be evidence of the possession of the whole. So in the case which was referred to of *Jones* v. *Williams* (1), acts done over one part of the bed of a river were held to be evidence of the right—not of the possession merely—of the Plaintiff to the whole bed. The circumstances of that case are shortly stated in the marginal note: "Where in trespass the Plaintiff claimed the whole bed of

(1) 2 M. & W. 326.

a river flowing between his land and the Defendant's, the Defendant contending that each was entitled *ad medium filum aquæ*— Held that evidence of acts of ownership exercised by the Plaintiff upon the bed and banks of the river on the Defendant's side lower down the stream, and where it flowed between the Plaintiff's land and a farm of *C.* adjoining the Defendant's land, was admissible for the Plaintiff." There the acts tended to rebut the presumption on which the Defendant relied, that as riparian proprietor he was entitled to the land to the middle of the river. There it was a question of title whether the Plaintiff had the whole bed of the river, or whether the Defendant had the land *ad medium filum aquæ*. The acts given in evidence were inconsistent with the claim of the riparian proprietors, and were held to afford some evidence of the opposing claim of the Plaintiff to the whole bed of the river.

But how are the acts here adverse to or inconsistent with the Plaintiff's title, and how can this rule of evidence be applicable to a question of undefined and disputed boundary? If the assumption of the Chief Justice was right that a boundary had been established, it may be that the rule referred to would apply; but that assumption failing, the acts which were done upon a distant part of the Defendant's land can in no way affect the title of the Plaintiff to the place in question. They are not inconsistent with his title or possession; and the argument is open in a case like the present to the fatal objection that it may be used, and with greater reason, by the Plaintiff, who has the title, to shew his own possession of the disputed land. The Plaintiff has done precisely the same kind of acts on his land as the Defendant has on his, and may with at least equal force contend that acts of possession on a distant part of his land are evidence of his possession of the disputed piece. It is impossible that the question of disputed boundary can be affected one way or the other by such acts.

In this case there is no evidence whatever of actual possession of the land in question, nor of any overt or physical act of ownership done upon it. It remains, as it ever was, in its forest and jungle state. The learned Chief Justice assumed, as may be the case, that both parties believed that X.Y.Z. was the true boundary, so that the Defendant enjoyed what may be called an ideal

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possession of this land. But the terms of this Ordinance require that he should have had undisturbed and uninterrupted possession; meaning actual possession, and not one existing only in the imagination of the parties.

On these grounds their Lordships are of opinion that the Defendant has entirely failed to bring the case within the Ordinance on which he relies.

The case of the Defendant, so far as it rests on estoppel, seems to be equally without foundation. The Chief Justice bases his judgment on an assumption which, if correct, might support this contention; but the evidence does not establish the fact which he assumes. The most pertinent part of his judgment on this point is as follows:—"The original description of boundaries was no doubt continued in the conveyances made on the sales; but, as the District Judge finds, upon the assurance of the surveys (which probably took place preparatory to the sales), the stream X.Y.Z. was locally understood"—that is, by the persons in the neighbourhood—"to be the boundary stream, and both vendors and purchasers intentionally dealt with each other for the land up to its bank; *i.e.*, for the plot (C), with the rest of the land, in the presence, so to speak, of the owners of *Wattagoda*, who were, as I understand, admittedly aware of the transaction, and acquiesced in it." The understanding of the people in the neighbourhood can hardly affect the Defendant. Then there appears to be no evidence that the owners of *Wattagoda* were either actually or constructively present at the sale of *Holyrood* to the Defendant, or that they were informed or had notice of the sale, or in any way acquiesced in it. The utmost that appears is that they did not interfere in it. But they had no right or reason to interfere when Mr. *Thompson* was selling his land to Mr. *Elphinstone*. If it was meant to bind the Plaintiff by anything like an estoppel, the parties who were then buying and selling should have gone to Mr. *Johnstone*, the then owner of *Wattagoda*, and have called his attention to the sale, giving him notice that they were dealing on the footing of this boundary, and inquiring if they were safe in so doing. If they had so done there might have been ground for the estoppel that has been set up.

The strongest evidence in favour of the estoppel is the trans-

action with regard to the boundary which is supposed to have taken place between Captain *Oldfield* and Mr. *Hood*, upon which their Lordships have already commented; and as, in their judgment, that transaction does not amount to the fixing of the boundary so as to bind the respective owners of the estates, still less does it amount in itself to an estoppel in point of law, which would estop Mr. *Clark* from setting up his real title. It is not to be forgotten that in this case both parties have purchased upon the original descriptions in the deeds, and upon the delineations in the maps annexed to them, and that the additional acreage which Mr. *Elphinstone* says that he bought, and which, he conceived, included this land, is not contained in the deed of conveyance to him. He undoubtedly must have made his purchase taking his chance whether he could establish his title to the additional quantity of land or not. He clearly has not established a title to the piece of land in dispute, which their Lordships think is indisputably in the Plaintiff, nor in their opinion has he established any bar by reason of the *Ordinance of Limitation*, nor anything which approaches to an estoppel which would prevent the Plaintiff from setting up his real title.

Under these circumstances their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, to affirm the first judgment of the Supreme Court, and to order that the Respondent do pay to the Appellant the costs of and incidental to the proceedings in the Supreme Court on review. The Respondent must also pay the costs of the appeal to Her Majesty.

Solicitors for the Appellant: *White, Borrett, & Co.*

Solicitors for the Respondents: *Torr, Janeways, Torr, & Gribble.*

[PRIVY COUNCIL.]

J. C.*
1881
Jan. 18, 19.

In re NAPIER'S PATENT.

Letters Patent—Prolongation of New Patent limited in its Application—Reservation of the Rights of the Crown.

THIS was an application by *R. D. Napier* for an extension of the term of letters patent granted to him on the 2nd of February, 1867, for his invention of "Improvements in breaks and apparatus for giving motion to machinery."

Mr. *Aston*, Q.C., and Mr. *Macrory*, for the Petitioner, after the evidence had been given, proposed to limit the claim of the patentee as follows: "The invention being restricted to those parts of the specification which describe the manufacture of differential breaks and clutches, and their application to windlasses and cranes."

Mr. *A. L. Smith* (Sir *H. James*, A.-G., with him) left the matter to their Lordships, submitting that if the term of the patent were prolonged, the rights of the Crown and its contractors should be reserved.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

Their Lordships have felt some difficulty in ascertaining what is the precise nature of the invention which the patentee claims, in consequence of the somewhat obscure manner in which the specification is drawn and the absence of any specific description of the claim made on the part of the patentee. The nature and extent of the invention, or the several inventions, of which the patentee seeks to have a monopoly are left to be inferred from the general description given in the specification. However, their Lordships think that it does appear sufficiently upon the specification that there is a claim for what the patentee calls a differential break,

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

which in its application to windlasses and to cranes is an invention of considerable utility. It seems to consist of a band which passes round the periphery of the barrel of the windlass, so far as it is applicable to a windlass, and by means of the action of a differential lever—that is, a lever having arms of varying length, one being shorter than the other—the effect is obtained of a self-acting break, which allows free motion in one direction of the barrel or wheel, and stops the motion when the reverse action is forced upon it. By the use of a windlass made according to the direction in the specification, and by combination of mechanism which contains this differential break, there is great facility given in veering out a cable, and in that way greater security is given to a vessel in times of distress and danger, and greater safety is insured to the men who work the machinery. Their Lordships, therefore, have come to the conclusion, that so far as regards the application of the differential break to windlasses, it is an invention of value, and indeed of considerable merit. There is also evidence that the invention may be usefully applied to a particular description of crane which has been called an overhead crane; but their Lordships have had no evidence that the application of the differential break to other machines which are mentioned in the specification has been productive of advantage. In the absence of that evidence their Lordships think that the prolonged patent should be confined to the machines which have been mentioned, viz., windlasses and travelling cranes. Their Lordships have had the accounts laid before them; and so far as the Crown has been able to investigate them, no objection has been made to the results which those accounts shew, and it certainly does appear that the patentee and his son, to whom he assigned the patent, have made no profit; but, on the contrary, have sustained some loss. Under these circumstances their Lordships think this is a case in which they may properly advise Her Majesty to prolong the letters patent limited to the machines which have already been mentioned; and they are disposed in this case to advise a prolongation for seven years. But the new letters patent will be restricted to the manufacture of differential breaks and clutches, or of either of them, as applied to windlasses and cranes in the manner described in the specification. The new letters patent must also be subject

J. C. 1881 *In re* NAPIER'S PATENT.

to the condition, which has become now a usual one in cases of inventions which are likely to be required for use by the Government, that the Government and its contractors should be entitled to use the invention.

Solicitor for the Petitioner: *Bristow Hunt.*
Solicitors for the Crown: *Solicitors for the Treasury.*

[PRIVY COUNCIL.]

J. C.* 1881 Jan. 19, 21, 22, 25.

In re ADAIR'S PATENT.

Practice—Foreign Patents should be stated in Petition—Renewal of English Patent although Foreign Patent expired—Duty of Patentee as to Accounts.

Where a patentee, whether English or foreign, has obtained foreign patents they should be stated to their Lordships and the fullest information afforded as to the profits thereof.

An English patent may be renewed though a foreign one has been taken out and allowed to expire.

A patentee should preserve the clearest evidence of everything which has been paid and received on account of the patent. Whether or not his remuneration has been adequate, his furnishing a satisfactory account is a condition precedent to his obtaining an extension of his term.

THIS was a petition of *William Adair* for a prolongation for seven years of his term for using his invention of "improvement in pumps," in respect of which he had obtained the usual letters patent on the 5th of April, 1867.

Mr. *Kay*, Q.C., and Mr *Chadwyck Healey*, for the Petitioner.

Mr. *Aston*, Q.C., and Mr. *Lawson*, for the Opponents.

Sir *H. James*, Q.C. (*Attorney-General*), and Mr. *A. L. Smith*, for the Crown.

After the evidence had been adduced,

Mr. *A. L. Smith* contended that, as a matter of practice, the

* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Petitioner ought to have mentioned in his petition that he had taken out foreign patents: see *Johnson's Patent* (1); *Pitman's Patent* (2); second, that as a matter of public policy, seeing that the foreign patents had expired, or were just about to expire, the patent ought not to be prolonged in this country: see *Normand's Patent* (3); and, thirdly, that the accounts were not satisfactory.

Mr. *Aston*, Q.C., also contended that the accounts were defective, and that the subject of the invention was not of a large and important character. He urged that the prolongation, if any, should be confined to the combination described in the specification and should not include the alleged improvements. [SIR MONTAGUE E. SMITH:—We simply extend the patent as it is, if we extend it at all.]

Mr. *Kay*, Q.C., in reply, urged, as to the point of practice, that there was no strict rule of pleading applicable, nor were petitions required to be, and in this case had not been, settled by counsel. No one had been misled, for the objections stated the foreign patents, and all sales abroad had been brought into account. The rule that a patentee first obtaining his patent abroad had no claim after the expiry of his foreign patent to a prolongation of his English patent does not apply to an English subject who had first obtained his patent in this country: see *Hill's Patent* (4); *Betts' Patent* (5); *Poole's Patent* (6); *Johnson's Patent* (1). He further contended that on the evidence the accounts were satisfactory.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In this case their Lordships agree that the patent is a meritorious and a useful one; and undoubtedly the patentee, his patent having been extensively infringed and he having been put to very large costs in maintaining it, costs which unfortunately he has

(1) Law Rep. 4 P. C. 79.
(2) Ibid. 84.
(3) Law Rep. 3 P. C. 193.
(4) 1 Moore's P. C. (N.S.) 258.
(5) Ibid. 49.
(6) Law Rep. 1 P. C. 518.

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been unable to recover, comes before their Lordships with a case entitled to their favourable consideration.

With respect to his remuneration their Lordships are by no means satisfied that he has been, considering all the circumstances, sufficiently remunerated; but before granting this application, they must be satisfied that the Petitioner has subscribed to those conditions which have again and again been laid down as precedent to his obtaining a renewal of his patent, which, as has been many times declared, is a matter of favour and not of right.

In the first place, their Lordships have to observe that the Petitioner, although stating in his petition that he had exhibited his invention in foreign countries and endeavoured to push it there, makes no mention whatever of his having obtained several foreign patents, two of which have been allowed to expire. The rule has been again and again laid down that where a patentee, whether English or foreign, has obtained foreign patents, they should be stated to their Lordships.

Moreover, it may be material to ascertain the date of those patents, inasmuch as if the date was prior to that of the English patent, even in the case of an English invention and an English patentee, it would at all events be a serious question whether the patent should be renewed. But in more than one case it has been said that there may be cases in which the profits of a foreign invention may be properly taken into consideration. It is therefore necessary for an English as well as a foreign patentee to give their Lordships the fullest information upon that subject.

It has been indeed argued, on the part of the Crown and of the opponents, that the Petitioner in this case, having taken out a foreign patent, although after the date of the English patent, and allowed it to expire, is thereby disentitled to a renewal; but upon examination of the cases it does not appear that any of them go the length of deciding that, with respect to an English invention and an English inventor, the mere taking out of letters patent in a foreign country and allowing them to expire, would be a reason for their refusal to renew the patent. In fact there are two cases—the case of *Betts* and the case of *Poole*—in which the

contrary has been held; their Lordships, therefore, do not give weight to that objection; but they have now to come to the question of the accounts.

In *Betts'* patent, which has been before referred to, the rule with respect to accounts was there stated by Lord *Chelmsford*: "There can be no difficulty in a patentee beginning from the first to keep a patent account distinct and separate from any other business in which he may happen to be engaged. He knows perfectly well that if his invention is of public utility and he has not been adequately remunerated, he will have a claim for an extension of the original term of his patent. It is not, therefore, too much to expect that he should be prepared, when the necessity arises, to give the clearest evidence of everything which has been paid and received on account of the patent." (1) And the same doctrine is laid down by Lord *Cairns* in *Saxby's Patent* (2), which insists upon the necessity of the patentee giving their Lordships' accounts which, as he expresses it, should be so clear as not to admit of controversy.

Now their Lordships feel some anxiety whether or not they would be justified in passing these accounts, that is to say, in so far approving of them as to base an extension of the patent upon them, and have with some reluctance come to the conclusion that these accounts are not satisfactory, and that they could not adopt them as satisfactory without in some degree, at all events, relaxing the rule which has been laid down many times by their predecessors.

[Their Lordships then discussed the accounts which had been made up, after the destruction of a number of his books by rats, &c., by the Petitioner, with the result that they were declared "to rest upon no valid foundation." The judgment then proceeded:—]

Under these circumstances their Lordships, though they are not prepared to say that the Plaintiff may not have been insufficiently remunerated, cannot enter into a speculation as to what his absolute remuneration was. It may have been a good deal more than here appears. It is perhaps difficult to suppose it

(1) 1 Moore, P. C. (N.S.) 61. (2) Law Rep. 3 P. C. 292.

J. C. 1881 *In re* ADAIR'S PATENT.

can have been less, but whether it was or was not sufficient appears to them not to be the question, but whether he has complied with the condition of supplying them with a satisfactory account. Under these circumstances their Lordships have come to the conclusion that the account is not satisfactory. It is not founded only upon the omission (which they regard as a serious one) to give them information upon the foreign patents, but also upon the ground that the accounts not being satisfactory, they feel that it would not be consistent with their duty to advise Her Majesty to extend this patent.

Solicitors for Petitioner: *Wynne & Son.*
Solicitors for Opponents: *Field, Roscoe, & Co.*
Solicitor for the Crown: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

EDWARD JAMES DANIELL . . . . . DEFENDANT;

AND

JAMES SINCLAIR . . . . . PLAINTIFF.

J. C.*
1881
Jan. 28;
Feb. 1, 22.

ON APPEAL FROM THE COURT OF APPEAL AT NEW ZEALAND.

Mortgagor and Mortgagee—Settled Account re-opened, Compound Interest charged by Mistake—Mutual Mistake of Law.

In the absence of special agreement simple interest only can be charged in a mortgage account.

Where such mortgage account had been settled on the footing of compound interest with half-yearly rests, both parties wrongly understanding the mortgage deed to require the same:—

Held, that such settled account might be re-opened.

Although under certain circumstances the giving credit in account may be treated as so far equivalent to payment under mistake of law as to prevent sums wrongly credited being recoverable at law; yet in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn.

APPEAL from an order of the Court of Appeal of *New Zealand* (Feb. 4, 1880) affirming a decree (Oct. 1, 1879) of the Supreme Court.

This latter decree, so far as it was originally appealed against, decreed that simple interest only since the 4th of January, 1869, should be allowed upon £2472 4*s.* 6*d.*, the balance admitted as the principal sum due by the Respondent to the Appellant on that date, on the footing of a mortgage dated the 11th of May, 1865, and that in taking an account as thereby directed, the account hereinafter mentioned as signed by the Respondent on the 11th of May, 1872, should not be considered as a stated and settled account between the parties ascertaining and fixing the amount due on that date.

The circumstances out of which the suit arose and the findings

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.

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of the jury thereon are set out in the judgment of their Lordships.

The judgment of the Court of Appeal was to the effect that compound interest could not be charged, there being no agreement to that effect between the parties either express or implied. Upon the latter point it proceeded:—

"But, assuming that an agreement may be implied between mortgagor and mortgagee, pure and simple, to pay compound interest founded upon the acts, mode of dealing, or acquiescence of the parties, the question remains whether such an agreement ought to be implied in the present case.

"This question may be dealt with in either of two modes, viz., either by looking at the facts admitted by the pleadings and the findings of the jury only, which we take to be the mode more in accordance with the rules of the Supreme Court of *New Zealand*, or by looking not only at these but also at the evidence laid before the jury, as perhaps a Court of Equity in *England* would do. We shall adopt both modes.

"Taking the first mode, we find that the Respondent, upon the 4th of January, 1869 (the mortgage being dated the 11th of May, 1865, payable on the 11th of May, 1867), admitted by deed his indebtedness to be £2547 12*s.* 2*d.*, a portion of which amount was composed of compound interest, of which the Respondent was at the time aware. This, on the principle of *Blackburn* v. *Warwick* (1), concludes him up to that date, and it is on that basis that the direction appealed against proceeds.

"But that does not imply any agreement to pay similar compound interest in future. *Fergusson* v. *Fyffe* (2) and *Blackburn* v. *Warwick* (1) establish this. Then we find that the accounts between the Respondent and the Appellant have always been kept with half-yearly rests, and that the interest due at such half-yearly rests has been added to the principal and interest charged thereon accordingly. Now the interest on the mortgage was payable not half-yearly but quarterly, and it is difficult to understand why these rests should have been made half-yearly, except upon the presumption which we shall hereafter refer to, and assuming

(1) 2 Y. & C. (Exch.) 99. (2) 8 Cl. & F. 121.

that by the finding that the accounts were so "kept" is meant that they were so prepared by Appellant, rendered to Respondent, and not objected to by him, this cannot constitute an agreement by acquiescence, otherwise *Tompson* v. *Leith* (1) was wrongly decided. There, there were not only accounts rendered, but formal notice given that interest on interest would be charged, which was never objected to. In *Clancarty* v. *Latouche* (2) the acquiescence in accounts rendered, which was held to imply an agreement, was an acquiescence in a common mercantile custom of bankers on a banker's account.

"Then we find that the Respondent, on the supposition that the mortgage authorized the Defendant to charge compound interest, consented to the accounts being so kept, and ratified and confirmed in writing accounts so kept, and admitted his indebtedness as appearing by such accounts.

"Now, even admitting the supposition of the Respondent referred to, it seems to us that the ratifying and confirming in writing (not by deed) of accounts rendered, and an admission of indebtedness to the amount shewn, is not conclusive, though it may be presumptive evidence of the accuracy of such accounts.

"Errors, whether in calculation or in mode of charging, might, nevertheless, be urged in defence to an action on the account stated, although they might not form a ground for recovering an amount erroneously paid: *Rose* v. *Savory* (3); *Thomas* v. *Hawkes* (4); *Wilson* v. *Wilson* (5). But when taken in conjunction with the finding of the jury as to the Respondent's state of mind when making the admission of indebtedness, we do not think much weight ought to be attached to such admissions, and certainly they cannot be accepted as implying an agreement to pay compound interest in face of the deed of mortgage.

"These, according to this mode of dealing with the question, are the only facts in support of an implied agreement to pay compound interest; whilst, on the other hand, it appears from the declaration that both parties are merchants, and therefore

(1) 4 Jur. (N.S.) 1091.
(2) 1 Ball. & B. 420.
(3) 2 Scott, 199.
(4) 8 M. & W. 140.
(5) 14 C. B. 616.

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accustomed to keep accounts of their ordinary mercantile transactions in the form in which these mortgage interest accounts have been kept. Indeed, the balance of their mercantile account, £15 7*s.* 8*d.*, seems to have been mixed up with the interest account, and on that sum compound interest has been allowed by consent, although otherwise the Court could not on the principle of *Fergusson* v. *Fyffe* (1) and other cases, have allowed it.

"Taking now the other mode of considering this question, by looking, in addition, at the evidence submitted to the jury, it appears to us that the evidence scarcely bears out the finding of the jury. The evidence shews an acquiescence in, rather than a consent to, the mode in which the accounts were kept, and the hesitating and bald certificates to the two accounts rendered do not to our minds amount to a ratification and confirmation of accounts, nor an admission of indebtedness sufficient to stop the Respondent from setting up his legal and equitable rights under the mortgage deed.

"In either view it seems to us that *Tompson* v. *Leith* (2) was a much stronger case than the present one for allowing compound interest. There deliberate notice was from time to time given of the intention to charge compound interest, and that notice in writing, if not formally consented to, was in writing acquiesced in. Here the two parties treat their mortgage rights and liberties as if they were upon ordinary mercantile accounts, apparently ignorant or oblivious of the difference between the two sets of positions.

"*Crosskill* v. *Bower* (3) also seems to us a strong authority for the Respondent, the portion of the judgment therein so strongly relied on in argument by Mr. *Bell* applying clearly to the mercantile account, not to the mortgage debt. Whilst the case of *Mosse* v. *Salt* (4), relied on in the judgment of the Court below, seems to us to be in point, and well applied."

Mr. *Benjamin*, Q.C., and Mr. *Everitt*, for the Appellant, contended that compound interest had been charged in the account

(1) 8 Cl. & F. 121.
(2) 4 Jur. (N.S.) 1091.
(3) 32 Beav. 86.
(4) Ibid. 269.

9 Jur. NS 267

with the consent of the Respondent. The Appellant had on the faith of his settling accounts from time to time on that footing, continued to give credit to him, and, therefore, there was consideration. It was unnecessary that such consent should be evidenced by deed. The settled account was evidence sufficient. There was no *primâ facie* case made out for relieving the Respondent from the consequences thereof. Here there was express agreement with some consideration, and notwithstanding mistakes of law, *i.e.*, as to the construction of a deed and the legal rights of the parties thereunder, the agreement was valid and binding. Reference was made to *Mosse* v. *Salt* (1); *Clancarty* v. *Latouche* (2); *Crosskill* v. *Bower* (3); *Blackburn* v. *Warwick* (4); *Chambers* v. *Goldwin* (5); *Tompson* v. *Leith* (6); *Stewart* v. *Stewart* (7); *Kitchin* v. *Hawkins* (8); *Rogers* v. *Ingham* (9); *Alliance Bank* v. *Broom* (10). To get leave to surcharge and falsify you must, according to Equity rules and procedure, allege and prove errors of account in fact, and that has not been done here: *Parkinson* v. *Hanbury* (11); *Drew* v. *Power* (12); *Gething* v. *Keighley* (13); *Fergusson* v. *Fyffe* (14). [SIR BARNES PEACOCK referred to *Skyring* v. *Greenwood* (15)]. See also notes to *Smith's* Leading Cases, vol. ii. [7th Ed.], pp. 420, 421; *Seton* on Decrees, vol. ii., part 4, pp. 794, 796 [4th Ed.]

Mr. *Rigby*, and Mr. *Chalmers* (the *Solicitor-General*, Sir *F. Herschell*, Q.C., with them), for the Respondent, contended that compound interest was not recoverable. The Court of Appeal was right in holding that there was an acquiescence in rather than a consent to the mode in which the accounts were kept. The settled accounts, although *primâ facie* evidence of indebtedness, could not estop the Respondent from setting up his rights

(1) 32 Beav. 269; 32 L. J. (Ch.) 756.
(2) 1 Ball. & B. 420.
(3) 32 Beav. 86.
(4) 2 Y. & C. (Exch.) 99.
(5) 9 Ves. 271.
(6) 4 Jur. (N.S.) 1091.
(7) 6 Cl. & F. 911.
(8) Law Rep. 2 C. P. 22.
(9) 3 Ch. D. 351.
(10) 2 Dr. & S. 289.
(11) Law Rep. 2 H. L. I.
(12) 1 Sch. & Lef. (Irish) 182.
(13) 9 Ch. D. 547.
(14) 8 Cl. & F. 121.
(15) 4 B. & C. 281.

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under the mortgage deed. Moreover, a mortgagee relying on a settled account must plead it: see *Roberts* v. *Kuffin* (1) a case recognised as authority by *Maddocks*, and all successive editors of *Daniell's* Chancery Practice, and by *Lindley*. In surcharging and falsifying an account errors of law as well as of fact may be corrected. Equity does not distinguish between mistakes of law and mistakes of fact as a ground for relief, except that it will not come into conflict with Courts of law; and as the latter have laid it down that money actually paid under a mistake of law cannot be recovered back, that principle is not interfered with. One error is sufficient to open an account—perhaps an error of fact, but, when open, errors of law may be corrected. There is no authority to be cited that an account may be opened for mistake of law, for it has never been questioned. Reference was made to *Rogers* v. *Ingham* (2); *Re James* (3); *Earl Beauchamp* v. *Winn* (4); *Rose* v. *Savory* (5); *Thomas* v. *Hawkes* (6). The rule relied upon is merely one which is intended to put an end to litigation, and therefore is not applicable till money has been actually paid, mere settlement of account is not enough. *Wilson* v. *Wilson* (7). It is not pleaded that accounts were signed because forbearance was agreed to be given: *London Chartered Bank of India* v. *White* (8). Reference was also made to *Kendal* v. *Wood* (9).

Mr. *Benjamin*, Q.C., replied.

1881 *Feb.* 22.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This was a suit instituted for the redemption of a mortgage, and an account of the principal and interest due. The Defendant contended that compound interest was due, and whether the interest was to be simple or compound was the only question in

(1) 2 Atk. 112.
(2) 3 Ch. D. 351.
(3) Law Rep. 9 Ch. 609.
(4) Law Rep. 6 H. L. 223.
(5) 2 Scott, 199.
(6) 8 M. & W. 140.
(7) 14 C. B. 616.
(8) 4 App. Cas. 413, 424.
(9) Law Rep. 6 Ex. 243.

the cause. The Court of first instance gave judgment in favour of the Plaintiff, with the exception of a small sum of compound interest, which the Plaintiff by the deeds of further security to be afterwards referred to had converted into principal. This judgment was affirmed by the Court of Appeal. From the latter judgment the present appeal is preferred.

The Plaintiff is a merchant in *New Zealand*, the Defendant a merchant in *London*. The declaration sets out a mortgage bearing date the 11th of May, 1865, for the purpose of securing payment of £2000, advanced by the Defendant to the Plaintiff for two years, and of all such further and other sums, if any, as may at any time hereafter be due and owing by the mortgagor to the mortgagee on the balance of any account current hereinafter existing between the said parties hereto, or in respect to any future advances to be made between the said parties in any account whatsoever; then follows a covenant to pay interest at the rate of 10 per cent. on the balance of account current after demand in writing, and to pay the principal sum on the 11th of May, 1867, and interest thereon at 10 per cent. in quarterly payments.

The declaration further sets out two conveyances, dated the 4th of January, 1869, to one *Stuart*, for the purpose, in the first place, of securing a debt to *Stuart*; and, secondly, of further securing the debt to the Defendant, which the Plaintiff acknowledged then to amount to £2487 12*s.* 2*d.* (which addition of £487 12*s.* 2*d.* to the principal was composed partly of compound interest), with a power of sale to *Stuart*, for, in the first place, paying himself, and then making payments to the Defendant. The declaration alleges sales by *Stuart* and the Defendant, and some payments by *Stuart* to the Defendant, and prays for an account of the principal and interest due on the mortgage, and a reconveyance.

The material pleas by the Defendant are, 1, that the moneys advanced by him were advanced on a mercantile account current; 2, that it was agreed between Plaintiff and Defendant, both at the time of and immediately after the execution of the deed set out in the first paragraph of the Plaintiff's declaration, that in taking and keeping the account current between the Plaintiff and

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Defendant half-yearly rests should be taken, and that the interest due on the half-yearly rests should be added to and become part of the principal moneys, and bear interest accordingly; and the accounts have always been so kept with the consent of the Plaintiff, who has from time to time ratified accounts so kept, and admitted his indebtedness to the Defendant of the whole amount shewn in such accounts, where interest has been computed upon half-yearly rests.

The Defendant submitted to the taking of the accounts as prayed.

The Plaintiff, in reply, denied the agreement.

The following are the material issues in the case, and the findings upon them by the jury:—

Was the amount of the Plaintiff's indebtedness to the Defendant on the 4th of January, 1869, the sum of £2487 12*s.* 2*d.*?—Yes.

If so, was the said sum of £2487 12*s.* 2*d.* composed of the principal sum of £2000 mentioned in the said deed of mortgage, and £487 12*s.* 2*d.* interest due in respect of the said principal sum?—Yes, except £15 7*s.* 8*d.*, deficiency in proceeds of wool consigned by Plaintiff to Defendant.

Was the said principal sum of £2000 advanced by the Defendant to the Plaintiff on a mercantile amount current?—By direction, No.

Was any portion of the said sum of £2487 12*s.* 2*d.* advanced by the Defendant to the Plaintiff upon a mercantile account current, and, if so, how much?—Yes, the said sum of £15 7*s.* 8*d.*, and no more.

Was it agreed by and between the Plaintiff and Defendant, after the execution of the deed set out in the first paragraph of the declaration, that in taking and keeping the accounts between the Plaintiff and the Defendant half-yearly rests should be taken, and that the interest due at such half-yearly rests should be added to and become part of the principal moneys, and bear interest accordingly?—No, unless such agreement ought in law to be implied from the Plaintiff's accounts being so kept. But we find that he so consented on the supposition that a deed in the terms

of the mortgage of the 11th of May, 1865, authorized the Defendant to charge compound interest.

Have the accounts always been so kept?—Yes.

Has the Plaintiff consented to the accounts being so kept, and has he ratified and confirmed in writing accounts so kept, and admitted his indebtedness as appearing by such accounts?—Yes.

No attempt was made at the trial to prove an actual agreement, either written or oral, to change the interest, as stipulated in the mortgage deed, from simple to compound, and it seems clear that no such agreement was ever made. But it appeared that the Plaintiff, under the belief that he was bound to pay compound interest on the mortgage, assented to accounts made out on the footing of half-yearly rests, and that, in particular, on an account being sent to him stating a balance of £3464 16*s.* 2*d.* as due on the 11th of May, 1872, part of which consisted of compound interest charged on the footing of half-yearly rests, he signed it as correct, and that in 1876 he sent to the Defendant what he termed a sketch account, in which compound interest with yearly rests was calculated.

A Judge sitting in Banco adopted the finding of the jury, that no actual agreement to pay compound interest had been come to; he further came to the conclusion that both parties wrongly understood the mortgage deed as requiring the payment of compound interest, and that no agreement to pay it could be implied from the transactions between the parties, such interest having been charged by the Defendant and paid by the Plaintiff under a common misapprehension of their rights. He therefore gave effect to the rule of law, which was undisputed, that without such an agreement simple interest only can be charged on a mortgage account. He treated, however, the deeds which stated that £2487 12*s.* 2*d.* was due by the Defendant on the 4th of January, 1869, as binding on him, and directed the Master to commence the account from that day, treating the whole of that sum as principal.

The judgment of the Court in Banco was confirmed by the Court of Appeal.

It appears that the Defendant insisted, independently of the

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main question, that a direction should be given that the account prior to the 11th of May, 1872, should not be reopened, contending that, even upon the assumption of there having been no agreement to vary the rate of interest under the mortgage, the account up to that time was settled, and could not be disputed. The Judge sitting in Banco declined to give such a direction, observing, "In my opinion, this is nothing more than a particular instance of that general acquiescence on the part of the Plaintiff in the Defendant's mode of stating the account between them with which I have already dealt; and, for the reasons already given, and on the authority already cited, his approval of the account on this occasion does not conclude him."

The same view is taken by the Court of Appeal.

On the appeal before this Board, this last is the only point now relied on, it not being contended that the settlement of account, if it were such, would not prove a contract to pay compound interest for the future.

Undoubtedly there are cases in the Courts of common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off: *Skyring* v. *Greenwood* (1). But in Equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. In *Earl Beauchamp* v. *Winn* (2), Lord *Chelmsford* observes, "With regard to the objection, that the mistake (if any) was one of law, and that the rule '*ignorantia juris neminem excusat*,' applies, I would observe on the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well known rule of law; and there are many cases to be found in which Equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake."

(1) 4 B. & C. 281.

(2) Law Rep. 6 H. L. 234.

In *Cooper* v. *Phibbs* (1), Lord *Westbury* says: "Private right of ownership is a matter of fact; it may be also the result of matter of law; but if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable to be set aside, as having proceeded upon a common mistake."

In *M'Carthy* v. *Decaix* (2), where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, the Lord Chancellor observes, "What he has done was in ignorance of law, possibly, of fact; but, in a case of this kind, this would be one and the same thing."

In *Livesey* v. *Livesey* (3), an executrix who, under a mistake in the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments.

Undoubtedly the signature by the Plaintiff of the account in question, if it stood alone, unexplained, would afford a strong presumption that an agreement to substitute compound for simple interest under the mortgage had been come to, and it was for the purpose of proving the agreement which the Defendant had pleaded that the account was relied upon. Their Lordships accept the finding of the jury that no such agreement was in fact made; indeed there would seem to have been no consideration for it, because, although the Defendant did not exercise his power of sale as soon as he might, there is no evidence that he ever bound himself or promised to shew any forbearance or indulgence to the Plaintiff. Their Lordships further agree with the Courts below, that both parties may be taken to have misunderstood the effect of the mortgage deed. This being so, there was no intention to make a change in the rate of interest—no such question was discussed or considered. The accounts were drawn up and assented to by the parties under a common mistake as to their respective rights and obligations. Their Lordships are therefore of opinion that the signature of a particular account occurring in a series of accounts

(1) Law Rep. 2 H. L. 170. (2) 2 Russ. & My. 614.
(3) 3 Russ. 287.

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all alike drawn up in error, does not prevent it being reopened upon the accounts under the mortgage being taken.

They will, therefore, humbly advise Her Majesty that the judgment appealed against be affirmed, and the appeal dismissed, with costs.

Solicitors for Appellant: *Clarke, Rawlins, & Clarke.*
Solicitors for Respondent: *Hare & Fell.*

[HOUSE OF LORDS.]

MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT . . . . . } APPELLANTS;

AND

FREDERICK HILL AND OTHERS, EXECUTORS, &c. . . . . } RESPONDENTS.
WILLIAM LUND AND ALFRED FRIPP .

H. L. (E.), 1881 *Jan.* 14, 17, 18; *March* 7.

Metropolitan Poor Act—Hospitals—Nuisance.

The *Metropolitan Poor Act*, 1867 (30 Vict. c. 6) authorizes the formation of districts and district asylums for the care and cure of sick and infirm poor, creates corporations for that purpose, gives authority to the Poor Law Board (now the Local Government Board) to issue directions to these corporations, enables them to purchase lands and erect buildings for the purposes of the Act, and makes the rates of parishes and unions liable for the outlay thus incurred. But it does not, by direct and imperative provisions, order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighbourhood of the place where the land is purchased, or the buildings erected, it does not afford to these acts a statutory protection. And therefore, where such nuisance was found as a fact:—

Held, that the District Board could not set up the statute, nor the orders of the Poor Law Board under it, as an answer to an action, or to prevent an injunction issuing to restrain the Board from continuing the nuisance.

Per LORD BLACKBURN:—On those who seek to establish that the Legislature intended to take away the private rights of individuals, lies the burden of shewing that such an intention appears by express words or necessary implication.

Per LORD WATSON:—Where the terms of a statute are not imperative, but permissive, the fair inference is that the Legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights.

THE Appellants were persons who had been incorporated by the *Metropolitan Poor Act*, 1867 (30 Vict. c. 6), for the purpose of providing hospitals for the reception of the sick poor of the metropolis. Sir *Rowland Hill* (whose executors were the first of the Respondents), Mr. *Lund*, and Mr. *Fripp*, resided at *Hampstead* and had property there, and the action, the subject of the present appeal, was brought by them against the Appellants, alleging that

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the Appellants had erected a certain hospital near their properties, for the reception of persons suffering from small-pox and other infectious and contagious disorders, which was a nuisance, and had carried on the said hospital so as to be a nuisance. The Appellants traversed these allegations.

The cause came on for trial before Mr. Baron *Pollock* and a special jury on the 18th of November, 1878. The learned Judge left certain questions to the jury which, with their answers, were in the following form: "(1.) Was the hospital a nuisance occasioning damage to the Plaintiffs, or either and which of them, *per se;* or (2) was it a nuisance to them by reason of the patients coming to or going from the hospital?—*Ans.* to the two questions. The hospital was a nuisance occasioning damage to the Plaintiffs, and each of them, *per se,* and also by reason of the patients coming to or going from the hospital. (3.) Assuming that the Defendants were, by law, entitled to erect and carry on an hospital, did they do so with all proper and reasonable care and skill with reference to the Plaintiffs' rights?—*Ans.* No. (4.) Assuming them by law entitled to erect and carry on this hospital did they do so with all proper and reasonable care and skill with reference to the Plaintiffs' rights?—*Ans.* No. (5.) Did the Defendants use proper care and skill with reference to the ambulances?—*Ans.* The ambulances ought to have been disinfected before leaving the hospital." As to everything done in the hospital itself the jurors gave great praise to everybody concerned. The verdict was on these answers ordered to be entered for the Plaintiffs, and on farther consideration judgment was entered for them, and the learned Judge granted an injunction to restrain the Defendants from continuing to use the hospital as before, but the issue of the injunction was suspended with liberty to either party to apply, and execution was stayed (1). A rule to reverse the judgment or to have a new trial was obtained, and an order was made by the Queen's Bench Division dissolving the injunction and granting a new trial, with a direction that the costs of the first suit should abide the result of the new trial. The Plaintiffs appealed against that order as to the granting a new trial, and the Defendants appealed against it as to the payment of costs, and on the 18th of

(1) 4 Q. B. D. 433.

December, 1879, the Court of Appeal made an order varying it by dismissing the Plaintiffs' appeal if, within a specified time, the Defendants paid the costs of the first trial (with an exception of certain specified costs), and if that was not done, the Plaintiffs' appeal was to be allowed. This order of the Court of Appeal as to granting a new trial was brought up to this House and received the designation of Appeal No. 1. In the first instance it was argued on the question of competency, it being alleged by the Plaintiffs to be in substance a mere appeal on costs. The House, however, decided that it was not so to be considered (1), but, before hearing the appeal on the facts, suggested that it would be advisable to hear the appeal on the question of the right of the Appellants, in point of law, to maintain the hospital in its existing state; and this was called Appeal No. 2.

Sir *J. Holker*, Q.C., and Mr. *Willis*, Q.C. (Mr. *C. H. Anderson* and Mr. *Proudfoot* were with them), for the Appellants:—

What had been done here was done under statutory authority, and therefore was not the subject of an action at the suit of individuals who alleged that they were injured by it. The injury was, as a matter of fact, denied, and would be argued on the appeal against the order granting a new trial, but in the present appeal the question raised was whether the Appellants were not, in law, completely protected from liability. They were constituted a public body by virtue of a statute—they had duties specially assigned to them—those duties were of a public nature—the Appellants were required to perform them, being thereto commanded by the Local Government Board. They had obeyed the orders of that Board, and as everything that had been done had been so done under statutory authority, any private individuals who thereby suffered inconvenience must bear it, for such was the intention of the Legislature, which, in passing the statutes relating to this matter, must be assumed to have contemplated the possibility of the private inconvenience, and to have determined that that inconvenience must be submitted to, in consideration of the great public benefit that was to result from it. The case of *Rex* v. *Pease* (2) laid down that doctrine, which had received its com-

(1) 5 App. Cas. 582.

(2) 4 B. & Ad. 30.

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plete and authoritative confirmation in *The Hammersmith Railway Company* v. *Brand* (1). The principle, therefore, was clear, and the words of the sections of the statute justified its application in the present case. The 5th section of the 30 Vict. c. 6, declared that "Asylums may be provided under this Act for the reception and relief of the sick, insane, or infirm or other class or classes of the poor chargeable in unions or parishes." The Poor Law Board was authorized (s. 6) for the purposes of the Act to combine into districts, parishes or unions, and sect. 7 directed in clear and positive terms that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." The 15th section gave the Poor Law Board powers from time to time to direct the managers of the asylums "to purchase or hire, or to build and fit up a building or buildings for the asylum, of such nature and size, and according to such plan as the Poor Law Board should think fit, and the managers shall carry such direction into execution." These last words cast an imperative duty on the managers, and rendered what they had done the execution of a clear statutory provision to which they were bound to pay obedience. Other sections gave the managers power to borrow money, on the security of the rates, for the purposes of the Act, and sect. 69, sub-sect. 2, declared that expenses incurred for "the maintenance of patients in any asylum specially provided under this Act for patients suffering from fever or small-pox" shall be repaid out of the common poor fund. Every detail in the Act shewed that the Legislature had contemplated the carrying into execution a public work for the health and safety of the public. That being so, it was impossible to apply to the case the considerations of possible private inconvenience that might occur in the execution of the great public work. The managers, in fact, were the mere executants of the orders of the Poor Law Board, the 28th section declaring that they shall be subject to the orders of the Poor Law Board "as guardians are under the Poor Law Acts." Everything in the Act shewed that the purpose in view was deemed a public purpose—the powers conferred were large, because they were powers for the execution of a public purpose, and the authority of the Poor Law

(1) Law Rep. 4 H. L. 171.

Board was paramount throughout the Act. Such cases therefore as *Rex* v. *Vantandillo* (1), and *Rex* v. *Burnett* (2), where the things done were unlawfully done, either had no application here or actually shewed that what was here done, being lawfully done, could not be made the subject of complaint.

Mere private inconvenience is not to be made the subject of an action where the act from which it arises has been authorized by Act of Parliament, and the powers given by the Act have not been exceeded. *The British Cast Plate Manufacturers* v. *Meredith* (3). *The Caledonian Railway Company* v. *Ogilvy* (4); *Vaughan* v. *Taff Vale Railway Company* (5); *The Attorney-General* v. *The Bradford Canal Company* (6); *The Attorney-General* v. *The Colney Hatch Asylum* (7); *Geddis* v. *The Bann Reservoir Company* (8); *Attorney-General* v. *Leeds* (9) were also cited. The cases which turned on the negligent performance of the duties and labours entrusted by Parliament to certain specified persons, such as *Whitehouse* v. *Fellowes* (10), had no application to this case, for here negligence was expressly denied, and the management of the hospital itself had received the warm commendation of the jury.

This injunction ought not to have been granted; the fears of mankind are not alone sufficient to warrant an injunction, especially in a case like this, where a great public benefit was intended to be, and would be, the consequence of the work done: *Anonymous* (11); *Baines* v. *Baker* (12). *Hawley* v. *Steele* (13) is a clear authority that where a work of a public nature like this is authorized to be done, a private individual who suffers an inconvenience from it cannot sustain an application for an injunction.

The Solicitor-General (Sir *Farrer Herschell*), and Mr. *Bompas*, Q.C. (Mr. *Finlay* was with them), for the Respondents:—

The principle laid down in *The Hammersmith Railway Com-*

(1) 4 Mau. & S. 73.
(2) Ibid. 272.
(3) 4 T. R. 794.
(4) 2 Macq. Sc. Ap. 229.
(5) 5 H. & N. 679. 4/Jn/85/302
(6) Law Rep. 2 Eq. 71.
(7) Law Rep. 4 Ch. Ap. 146.
(8) 3 App. Cas. 430.
(9) Law Rep. 5 Ch. Ap. 583.
(10) 10 C. B. (N.S.) 765; 30 L. J. (C.P.) 305.
(11) 3 Atk. 750.
(12) Amb. 158.
(13) 6 Ch. D. 521.

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pany v. *Brand* (1) is not questioned. What the Legislature has ordered to be done, if done as the Legislature has ordered it, cannot be made the subject of an action on account of inconvenience suffered by a private individual. But it must be clear that the Legislature has given the order, and that the order so given has been thoroughly pursued. The contention here is, that no such order has been given by the statute, but that the *Metropolitan Poor Act* has merely declared what was desirable to be done, and has authorized the persons who might be entrusted to do the work, to come on the poor rates of parishes and unions to reimburse the expenses they had incurred. There is nothing whatever in the *Metropolitan Poor Act* of 1867, to compel the Appellants to erect the small-pox hospital, to erect it in this particular place, or in this particular manner, and certainly nothing to authorize them to do all this in such a manner as to constitute the work a nuisance to the proprietors of the neighbouring lands. The fact that it is a nuisance has been found by the jury—and that finding takes away from the Appellants all pretence of protection under the statute, unless they can establish from the very words of the statute that all that they have done is directly ordered by the statute. They cannot do so, and the orders of the Poor Law Board do not assist them. They are told they may do certain things, but there is no authority directing them to do those things if the things themselves constitute a nuisance. There being no compulsory powers given to the managers to do what they have done, they are in the position of ordinary persons who, upon the principle stated by Lord Justice *Mellish* in *Clowes* v. *The Staffordshire Potteries Waterworks Company* (2), are entirely responsible for their acts. Powers given in matters of this sort must be strictly followed, and are not to be extended in favour of those on whom they have been conferred. *Hawley* v. *Steele* (3) is not in point against the Respondents, and in that case itself the Master of the Rolls, in refusing the injunction, suggested a strong opinion (4) that the Acts of Parliament relating to that matter "looked very much like authority" for doing what was complained of. That is not the case here: *Jones* v. *The Festiniog Railway Company* (5)

(1) Law Rep. 4 H. L. 171.
(2) Law Rep. 8 Ch. Ap. 125, at pp. 139–140.
(3) 6 Ch. D. 521.
(4) Ibid. at p. 527.
(5) Law Rep. 3 Q. B. 733.

is strongly adverse to the claim of the Appellants, for there the company was held liable for damages occasioned by sparks falling from one of its locomotive engines, because it had not express power given it to use locomotives; and in that case negligence in their use was expressly negatived. The statutory authority here is absent, and therefore what has been done is subject to question in an action, and the fact of a nuisance being established, the verdict and judgment were properly given for the Plaintiffs, and justified the Court in issuing the injunction.

Mr. *Willis*, in reply.

1881
March 7.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, it must be assumed for the present purpose, that the small-pox hospital which the Appellants have established at *Hampstead*, is, in its actual position, and independently of the particular way in which it is conducted, necessarily a nuisance to the neighbours; and the injunction, which has been granted by the order appealed against, is against "using the plot of land mentioned in the statement of claim, and buildings thereon, as a hospital for small-pox or any other infectious or contagious disorder, in such manner as to create a nuisance to the Plaintiffs, or either of them." The Appellants are therefore obliged, in order to succeed in this appeal, to prove that they have statutory authority to create a nuisance for the purpose of, and as incidental to, the maintenance of a small-pox hospital in this place.

The Appellants say that such authority has been given to them by the 5th, 7th, and 15th sections of the *Metropolitan Poor Act*, 1867, and by orders of the Poor Law Board made pursuant thereto. As far as the orders of the Poor Law Board are concerned, they did undoubtedly direct the Appellants to purchase the land in question at a specified price, and to build upon it an asylum for the reception of poor persons infected with or suffering from fever or small-pox; and I assume that the building, as erected and fitted-up on that land, is in strict accordance with plans which the Poor Law Board has prescribed or approved.

The statute when examined is found to confer, in general terms, powers extending over a rather wide range of subjects. So far as

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relates to a hospital or asylum of this particular kind, there is nothing in it mandatory or imperative. Everything which it necessarily requires may be done, though no such hospital should ever, or anywhere, be established. The 5th section says that, "asylums to be supported and managed according to this Act, may be provided under this Act for reception or relief of the sick, insane, or infirm, or other class or classes of the poor chargeable in unions or parishes in the Metropolis." The 6th section authorizes the formation of districts; and the 7th requires that, in each district so formed, "there shall be an asylum or asylums as the Poor Law Board from time to time by order direct;" leaving the class of poor persons, for whom any such asylum may be provided, entirely open. The 15th section enables the Poor Law Board from time to time, by order, to direct the managers "to purchase or hire, or to build, and (in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such plan, and in such manner, as the Poor Law Board think fit;" and the managers are required to carry such directions into execution. Subsequent clauses put the arrangements and conduct of any such asylum under the superintendence of the Poor Law Board. No compulsory power is given to acquire land, or any interest in land, for any asylum purposes. The Lands Clauses Acts are indeed incorporated by sect. 52; but sect. 53 expressly provides, that so much of those Acts as relates to the purchase of land, otherwise than by agreement, shall not be put in force except for certain purposes, not including these asylums. It appears incidentally from sect. 69 (which provides for the repayment of certain expenses therein specified out of the common poor fund), that asylums might be "specially provided under this Act for patients suffering from fever or small-pox;" but, except in that way, and from the fact that the general category of "sick" necessarily includes patients suffering from any kind of disease, there is no provision in the Act as to contagious or infectious disorders. If express words, or necessary implication and intendment, must be shewn, in order to authorize the Poor Law Board, or any managers of an asylum, to create a nuisance, in the exercise of the discretionary powers given to them, I can find none in this statute.

The result is: (1.) That this Act does not necessarily require anything to be done under it which might not be done without causing a nuisance; (2.) That as to those things which may or may not be done under it, there is no evidence on the face of the Act that the Legislature supposed it to be impossible for any of them to be done (if they were done at all) somewhere and under some circumstances, without creating a nuisance; and (3.) That the Legislature has manifested no intention that any of these optional powers, as to asylums, should be exercised at the expense of, or so as to interfere with, any man's private rights. The only sense in which the Legislature can be properly said to have authorized these things to be done is, that it has enabled the Poor Law Board to order, and the managers to do them, if, and when, and where, they can obtain by free bargain and contract the means of doing so.

If the Legislature had authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define, for the purpose of establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed) the present case might have been like *Rex* v. *Pease* (1) and *The Hammersmith Railway Company* v. *Brand* (2). No person outside the statutory line of compensation, even if the use of the asylum in the manner authorized by the statute had been productive of serious damage to him, could then have obtained any relief or remedy, upon the footing that what the statute authorized was a legal nuisance to himself, or, in itself an actionable wrong. But the case is different, when (as here) no interference at all with any private rights is authorized, and no place, or limit of space, is defined within which the establishment of such an asylum is made lawful. Neither the Poor Law Board nor the managers could for this purpose have taken a single foot of ground, or have interfered with any, the most insignificant, easement against the will of the Plaintiffs, or of any other person to whom such land or easement might belong. No line is here drawn by the Legislature between

(1) 4 B. & Ad. 30. (2) Law Rep. 4 H. L. 171.

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interests which are, and interests which are not, proper subjects for compensation. Under these circumstances, I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the Plaintiffs without their consent.

I therefore move your Lordships to affirm the judgment of the Court below, and dismiss this appeal.

LORD BLACKBURN:—

My Lords, in this case the Respondents, who were the Plaintiffs below, claimed in their writ damages for a nuisance arising from the use, by the Defendants, of their hospital at *Hampstead* for small-pox and other infectious and contagious diseases, and for causing the assemblage, in the neighbourhood of the Plaintiffs' property, of large numbers of persons suffering from small-pox or other infectious and contagious diseases, or having been recently in contact with persons so suffering, and from offensive smells and noises arising from the said hospital; and they asked for an injunction to restrain the Defendants from using the said hospital as a hospital for patients suffering from small-pox or other infectious and contagious diseases. [His Lordship here stated the proceedings which had taken place, and proceeded thus:—] The point on which the Defendants principally relied in the Appeal No. 2 was that, as they contended, the Legislature had, by the *Metropolitan Poor Law Act*, 1867, authorized the erection and maintenance of asylums for the reception of the sick poor chargeable in the metropolis; and with that object had given power to the Poor Law Board to make the metropolis into a district, and to create a corporation to be called the Managers of the Metropolitan Asylum District, who were bound to obey the directions of the Poor Law Board; that the Defendants were duly created by orders of the Poor Law Board; that all they had done in making and maintaining the hospital was *bonâ fide* done in obedience to the directions of the Poor Law Board, and the Local Government Board, which has since been substituted for the Poor Law Board.

And their contention was that, even if the maintenance of this hospital was a nuisance to the Plaintiffs, as owners and occupiers of adjoining property, such that if it had been maintained by

private persons the Plaintiffs would have been entitled to relief, the Legislature has thought fit for the public good to deprive them of that relief. This is a question of great public importance. It has been judged better to determine this question first.

In order to raise this question it must be assumed that the maintenance of this hospital on this plot of ground for the reception of so large a body of small-pox patients is necessarily a nuisance to the adjoining occupiers. But this must be without prejudice to the contention of the Defendants that the first two findings of the jury were not satisfactory. And it must also be without prejudice to the contention of the Plaintiffs, that even if the construction of the Act be what the Defendants contend and the Plaintiffs deny, still that the answers of the jury to the third, fourth, and fifth questions of the Judge, if satisfactorily obtained, would entitle the Plaintiffs to some relief. I now proceed to the discussion of the question thus raised.

I think that the case of *The Hammersmith Railway* v. *Brand* (1), in your Lordships' House, settles, beyond controversy, that where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle any one to an action, the right of action is taken away. It is enough to say that such was the unanimous decision of this House; but the reason briefly given by Lord *Cairns* (2) seems indisputable. "It is a *reductio ad absurdum*" to suppose it left in the power of the person who had the cause of complaint, to obtain an injunction, and so prevent the doing of that which the Legislature intended to be done at all events. The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others. What was the intention of the Legislature in any particular Act is a question of the construction of the Act.

Before considering the terms of the *Metropolitan Poor Act*, 1867, it may be as well to consider what was the state of the law before

(1) Law Rep. 4 H. L. 171. (2) Law Rep. 4 H. L. at p. 215.

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it was passed. The successive Poor Law Acts had given powers for the relief of the poor chargeable, and power to raise money for those purposes; and a series of enactments had given powers to purchase sites for workhouses, and to lodge and maintain the chargeable poor in those workhouses, and to raise money for that purpose. Those who had the management of such workhouses had thus the charge of a number of persons assembled together under circumstances that made it very likely that there should be sickness, and often contagious sickness, among them. I can, however find no words in any of the Acts prior to 1844 alluding to that likelihood. There are a few words in the *Poor Law Amendment Act*, 1844, in the preamble to sect. 4, that shew that the attention of those who framed that Act had been called to the likelihood of infectious disorders being communicated to the inmates of a workhouse; but there was no provision before the passing of the *Metropolitan Poor Act*, 1867, casting on the managers of a workhouse any special duties as to the management of the sick poor, nor any power to raise funds for any expenditure incurred for such an object, farther than it was involved in the maintenance of the persons chargeable. It seems that the Legislature left the managers of a workhouse subject to the duties which the Common Law cast upon those having the charge of others, and did not see any necessity for providing them with extraordinary powers, or with the means of raising funds for extraordinary expenses. Those who have the charge of a sick person, if he is helpless (whether the disease be infectious or not) are, at Common Law, under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person. And the sick person, if not helpless, is bound to do so for his own sake. When the disease is infectious, there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything that can be avoided which shall tend to spread the infection; and if either do so, as by bringing the infected person into a public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shewn that there was a sufficient cause to excuse what is *primâ facie* wrong: *Rex* v. *Burnett* (1).

(1) 4 Mau. & S. 272.

To take an extreme case, if a house in which a person ill of an infectious disorder lay bedridden, took fire, and it was necessary to choose whether the sick person was to be left to perish in the flames, or to be carried out through the crowd at the risk, or even the certainty, of infecting some of them, no one could suppose that those who carried out the sick person could be punishable; and probably a much less degree of necessity might form an excuse; but still some excuse is required. It is not necessary here to determine what constitutes a sufficient excuse.

Where those who have the custody of the person sick of an infectious disorder have not the means of isolating him from the other inmates, which is very commonly the case with the poor, and consequently those other inmates and the neighbours are exposed to the risk of infection, I think that the inability to isolate him would form a sufficient excuse to be a defence to any indictment; and I think also, though I am not aware of any authority on the subject, that the neighbours could not maintain any action for the damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to the use of property for habitations in town, that contagious sickness may befall their neighbours. If those who have the charge of the infected person have the means of isolating him on the spot, they certainly do well to use them, and if it cannot be done on the spot, and they can, either by their own means, or by the aid of charitable persons who have erected an hospital, find a place where he can be isolated so as to avoid the risk of infection, they will do well to use these means. I do not mean to express any opinion as to whether, at Common Law, they would or would not be responsible for not doing so; but there is no authority, and I think no principle, for saying that they are justified in removing him to a place where the neighbours would be exposed to contagion, though it may be that those neighbours would be fewer in number than the neighbours of the spot where the infection broke out; nor for saying that if that was done, and the contagion was such as to amount to a real nuisance, those neighbours might not maintain an action, and obtain an injunction to protect themselves against the importation of foreign infection. For though, as I have already said, I think it an incident to the use of a habitation

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in a town that the occupier must bear the necessary risks of the inmates of a neighbouring habitation falling ill of a contagious disease, I do not think it an incident that he is to submit to his neighbours wilfully, though for very laudable motives, and not maliciously, bringing in contagion where it did not previously exist, if the effect is not merely to alarm him, but to injure him. This, I think, is borne out by the decisions on the subject of inoculation.

Inoculation was, it is well known, introduced into this country in the early part of the eighteenth century. It consisted in artificially communicating the small-pox in such a manner that the patient took it in a very mild form; but was as much a source of infection to others as if the disease had been taken in the natural manner. The introduction of the practice was vehemently opposed. In 1752 a case came before Lord *Hardwicke*, which is reported in two reports: *Baines* v. *Baker* (1). I collect from the two reports that it was proposed by private persons to erect a building in *Coldbath Fields* to be used as a hospital for the reception of persons ill of the small-pox, and also for the reception of persons who were there to be inoculated. The Plaintiff was, it appears, owner of building land in the neighbourhood, and gave evidence (of something which seems very probable) that the fears of infection from the proposed hospital greatly deteriorated the letting value of his property. Lord *Hardwicke* refused to grant an injunction, saying, what is undoubtedly law, that loss arising from the fears of mankind, though in themselves reasonable, would not create a nuisance at law, and that, before he could grant an injunction, he must be satisfied that what was proposed to be done would be a legal nuisance affecting the Plaintiff's private rights. He is reported in *Ambler* to have said that he thought "such a charity was like to prove of great advantage to mankind; such an hospital must not be far from a town, because those that are attacked with that disorder in a natural way may not be in a condition to be carried far." This I think very true, and it is to borne in mind when construing the Act now in question. Lord *Hardwicke* seems to have decided that the Plaintiff made out no case of a nuisance to his private rights; and that, even if the

(1) 1 Amb. 158; S.C. *Anon.* 3 Atk. 750.

maintenance of a place for the artificial propagation of small-pox was indictable, which seems not to have been Lord *Hardwicke's* opinion, that was a public and not a private nuisance.

In *Rex* v. *Sutton* (1), in 1767, it was held that an indictment for maintaining a house for inoculating for the small-pox was not so plainly bad as to be quashed on motion. This is all that appears from the report, but from what Lord *Ellenborough* says in *Rex* v. *Vantandillo* (2) it would appear that there had been much more discussion at the time.

In *Rex* v. *Burnett* (3), in 1815, it was decided that, though inoculation for the small-pox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease. And I also think that, by necessary inference, it follows that to gather together in one spot patients suffering from infectious disease is lawful, but it must be under such guards as not to endanger the public health by communicating this infectious disease; and, as it seems to me, so as not to produce injury to the rights of the owners of adjoining property by producing a nuisance to it.

If this be a correct view of the law, it is obvious that, however desirable it might be to erect and maintain asylums for the reception of the sick poor, sick of infectious disorders, it could not be done by any parochial authorities unless the authority of Parliament was obtained for raising funds for the purpose, and authorizing a public body to obtain a site for the asylum. And the *Metropolitan Poor Act*, 1867, certainly created such a body and gave it powers to raise money, and without farther powers this body could erect an asylum, provided it was done in such a manner as neither to endanger the public health, nor to form a nuisance to private property. It is, for the reason given by Lord *Hardwicke*, necessary that the site of such an asylum should be not far from the places where the patients fall sick, and consequently, in the case of the metropolis, in an inhabited district.

I wish to express myself without prejudice to what I suppose will be one of the points to be decided in the Appeal No. 1. If it be the fact that such an asylum must be a nuisance, unless on a site so extensive as to keep all habitations at a considerable dis-

(1) 4 Burr. 2116.
(2) 4 Mau. & S. 76.
(3) 4 M. & S. 272.

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tance, it may be that such a site cannot be obtained at all in the neighbourhood of the metropolis, or only at a cost so enormous as to make it practically impossible. If that is the case it might be for the consideration of the Legislature whether the certain danger of infection, from leaving the infectious sick paupers where they fell ill, exceeded that which would arise from a well-regulated hospital erected in another place, to such an extent that it was for the public benefit that this latter risk should be run, and whether the rights of owners of property there should stand in the way of such a public benefit, or should be made to give way, with or without compensation.

In the *Metropolitan Poor Act*, 1867, there are provisions, sects. 15, 16, 17, 18, 21, 28, putting everything under the control of the Poor Law Board, and thus affording a considerable, and probably a sufficient, security that any asylum made under that Act should be a well-regulated asylum, and should not be made in any place unless the Poor Law Board thought it a fit place. But the question, as I think, is whether there is an intention shewn on the part of the Legislature to authorize the erection of an asylum where it is a nuisance to owners of the adjoining property if the Poor Law Board thought it a fit place, either mistakenly thinking the asylum would be no nuisance there, or, perhaps rightly, thinking that there was no other place in which it could be erected without being a greater nuisance than if erected there.

It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears. There are no express words in this Act, and I think the weight of argument is rather against than in favour of such an implication. There is no power given to take land for a site otherwise than by agreement. For, though the Lands Clauses Acts are incorporated by sect. 52, yet by sect. 53 so much of the Lands Clauses Acts as relates to the purchase of lands otherwise than by agreement, shall not be put in force except for the purpose of enlarging an existing workhouse.

The asylum under this Act must therefore be either made by (under sect. 18) converting a workhouse into an asylum, which is not the present case, or by erecting one on land purchased or hired by agreement. In *Clowes* v. *Staffordshire Potteries Waterworks*

Company (1), Lord Justice *Mellish* says (2): "If no compulsory powers were given for the purpose of purchasing lands upon which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of other persons, who have rights in the nature of easements over the lands so purchased."

He was discussing the question whether the party grieved retained his right to an injunction, or was compelled to seek for compensation. In the *Metropolitan Poor Act*, 1867, there is no compensation given, and the question is whether the purchase, by agreement, of the site for the asylum, gave the Defendants power without compensation to do, what would have been a wrong to the Plaintiffs if done by the former owners, which thus gives additional force to the argument of Lord Justice *Mellish* when applied to the construction of this Act.

It is true that in sect. 7 it is said that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time directs." But the construction of that is, I think, only that the managers shall make such asylums in obedience to the order of the Poor Law Board, if they can do so by exercise of the powers given them, and not to say that they must make them at all events, so as to give them additional powers to make the asylums by taking lands, or injuriously affecting lands otherwise than by agreement. I am sensible of the great difficulty that there may be in finding sites for asylums under this Act, or hospitals under the *Public Health Act*, 1875, s. 131, unless farther powers be given, but that must be for the consideration of the Legislature.

I do not understand that any other point is raised on the Appeal No. 2, and if your Lordships take this view of the construction of the *Metropolitan Poor Act*, 1867, I think it will follow that the Appeal No. 2 should be dismissed with costs.

LORD WATSON:—

My Lords, the only question to be determined in this appeal is, whether, on the assumption that the first and second findings of the jury are well founded, the Respondents are entitled to have an

(1) Law Rep. 8 Ch. Ap. 125. (2) Law Rep. 8 Ch. at p. 139.

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injunction restraining the Appellants from using a building erected by them at *Hampstead* as an hospital for the reception and treatment of persons suffering from small-pox or other infectious disease, to the nuisance of the Appellants, and also to recover damages from the Appellants in respect of the injury which they have thereby sustained.

The first and, according to the view which I take of the case, the more important of these two findings, is to the effect that "the hospital was a nuisance *per se*, occasioning damage to the Plaintiffs (Respondents) and each of them." By these words I understand the jury to affirm that the hospital which the Appellants have built, upon the site acquired by them with a view to its erection, cannot be used for the reception and treatment of persons suffering from small-pox without creating a substantial nuisance to the Respondents, as owners of certain neighbouring properties. I think it may be matter of reasonable inference from the terms of the finding, that nuisance would necessarily be occasioned to the Respondents by the use of any hospital for the special accommodation of small-pox patients, on the same site, and similar in size and character to that which the Appellants have built. But I do not understand the jury thereby to affirm the impossibility of erecting and using an hospital for the treatment of small-pox on a lesser scale, and according to a different plan, upon the site in question, or the impossibility of procuring elsewhere, a suitable site upon which an hospital, of the same plan and dimensions with that complained of, might be erected and so used without creating a nuisance in either case.

The second finding of the jury affirms that nuisance "was occasioned to the Respondent by reason of the patients going to or coming from the hospital." The precise meaning the jury intended to convey by that finding may be doubtful. It may signify that, in the opinion of the jury, the conveyance of small-pox patients to and from the hospital would of itself, and in all circumstances, occasion nuisance, although they might be treated within its walls without creating any nuisance. Or it may simply mean that the provision made by the Appellants for the entrance and exit of patients was defective, and that the nuisance thereby occasioned might be obviated by the adoption of a better

arrangement. Owing to the shape in which this appeal comes before the House, I have no means of ascertaining for myself the true import of the finding; and the parties, as I understood, were not at one upon the point. But in the view which I have taken of the legal consequences of the first finding, the second appears to me to be immaterial, whatever its true meaning may be.

I consider myself bound to assume that the verdict of the jury was given according to the facts, and in accordance with the law as correctly stated by the presiding Judge. I understood that so much was conceded by the counsel for the Appellants, and that their argument was addressed to the House on the footing that the building which the Appellants have erected at *Hampstead*, cannot be used for the treatment of persons suffering from small-pox without occasioning that which is, both in fact and law, a nuisance to the Respondents. In that case, it seems to be clear that if the Appellants acted in a private capacity, and without legislative sanction, they could not successfully impeach the judgment of Baron *Pollock*, confirmed by the Court of Appeal. That proposition I did not understand the Appellants to contest; but they allege that in providing a small-pox hospital at *Hampstead* they did no more than carry out the orders of the Local Government Board; and they maintain that the Board had full power, under the *Metropolitan Poor Act*, 1867, to order the erection and use of the building for the treatment of small-pox without reference to any nuisance thereby occasioned.

In these circumstances it was rightly represented on both sides of the Bar that the legal issue before the House depends upon the construction to be put upon the enactments of the statute of 1867. But I think it expedient, before dealing with the enactments of the statute in question, to consider shortly what kind or degree of statutory sanction is sufficient to justify the creation of a legal nuisance.

The judgment of this House in *The Hammersmith Railway Company* v. *Brand* (1) determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications, upon a particular site, and for a specific purpose, the use of these works or buildings, in the manner

(1) Law Rep. 4 H. L. 171.

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contemplated and sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such use may constitute a nuisance at common law; and that no compensation is due in respect of injury to private rights, unless the Act provides for such compensation being made. Accordingly the Respondents did not dispute that if the Appellants or the Local Government Board had been, by the *Metropolitan Poor Act*, 1867, expressly empowered to build the identical hospital which they have erected at *Hampstead*, upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from small-pox, the Respondents would not be entitled to the judgment which they have obtained. The Appellants do not assert that express power or authority to that effect has been given by the Act either to themselves or to the Board; but they contend that, having regard to the nature of the public duties laid upon them, and the necessities of the case, it must, on a fair construction of the Act, be held that the Legislature did intend them to exercise, and authorize them to exercise, such power and authority under the direction and control of the Poor Law Board.

I see no reason to doubt that, wherever it can be shewn to be matter of plain and necessary implication from the language of a statute, that the Legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed.

On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a

specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to shew that the Legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose.

To return to the statute upon the terms of which the Appellants seek to justify the nuisance which they must, for the purposes of the present case, be held to have established at *Hampstead.*

The objects of the Act of 1867 are various, but they all relate to the relief of the legal poor within the metropolis, and include the establishment of "district asylums for the reception and relief of the sick, insane, infirm, or other class or classes of the poor chargeable in unions or parishes." So far as regards this last object the Act seems to have been designed to supplement, if not to supersede, certain provisions of 7 & 8 Vict. c. 101, which made it lawful for the Poor Law Commissioners, in the cases of *London* and each of five other large cities in *England*, to combine parishes

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and unions into districts for the purpose of providing and managing asylums for the temporary relief of the destitute houseless poor. The machinery enacted by the statute for carrying out that object is very similar to that which is provided in regard to asylums by the Act of 1867.

The clauses of the Act of 1867, so far as these relate to asylums, are not complicated or ambiguous. Sect. 5 declares in general terms that asylums, to be supported and managed according to the provisions of the Act, "may be provided" for the reception and relief of the poor, or classes of poor, already mentioned; and in furtherance of that purpose it is declared by sect. 6 that the Poor Law Board "may from time to time" combine into districts unions or parishes, or unions and parishes, in the Metropolis. By sect. 7 it is imperatively enacted that "for each district there shall be an asylum or asylums, as the Poor Law Board may from time to time by order direct." These enactments are followed by clauses which provide for the constitution of a body of managers for each district formed under the Act. Then comes the 15th clause, which enacts that "the Poor Law Board may from time to time by order direct the managers to purchase or hire, or to build (and in either case) to fit up a building or buildings for the asylum, of such nature and size, and according to such a plan and in such manner as the Poor Law Board shall think fit." I assume that the words of the preceding clause are sufficient to confer, by implication, the same powers in regard to the purchase of a site which are expressly given in relation to the purchase of a building.

The other clauses requiring notice are the 17th, which empowers the managers to meet the expenses incurred in the execution of sect. 15, by borrowing on the security of the poor-rates of the unions and parishes comprehended in their district a capital sum to be repaid out of these rates by equal annual instalments not exceeding twenty, and also sects. 16, 51, 52, and 53. I shall not examine these four sections in detail, it being sufficient for the purposes of this case to state that their effect is to give the managers powers (1.) to acquire lands and buildings for the purposes of sect. 15 by voluntary purchase, no compulsory powers being given except "for the purchase of lands for the purpose of

enlarging a workhouse, hospital, or school, existing at the passing of this Act;" (2.) to acquire such lands and buildings by voluntary purchase from persons under legal incapacity; and, (3.) to use certain short statutory forms of conveyance.

Such being the substance of the enactments in the statute of 1867 which have a material bearing upon the present question, I am unable to find in them anything to support the plea that the Legislature thereby intended to authorize, in any case, the creation of a nuisance. I assume that the *Hampstead* Asylum has been erected in pursuance of the Act—in this sense, that the procedure prescribed by the statute has been strictly followed, both by the Local Government Board, standing in place of the Poor Law Board, and by the managers. There is no question as to the *bona fides* both of the Board and of the Managers. It is clear that they acted in the honest belief that all they did was for the benefit of the community, and within their statutory powers. But that will not avail if the Act does not empower either of them, or both, in conjunction, to erect an asylum to the nuisance of neighbouring proprietors. These powers appear to me to be from first to last permissive and not imperative. Whether they shall be exercised at all, and, if so, to what extent and effect their exercise shall be carried, is left to the discretion of the Local Government Board. No doubt, the language of sect. 7 is imperative, and that is a circumstance upon which the Appellants were fairly entitled to argue in support of their contention. But it is, in my opinion, a conclusive answer to their argument that, in the first place, the Board is not bound to form a district, and in the second place, if they do see fit to form a district in terms of sect. 6, they are under no statutory compulsion to establish an asylum for small-pox patients by reason of the provisions of sect. 7, but have ample means of satisfying these provisions by the erection and use of an asylum or of asylums which do not constitute a nuisance to anybody. So far as regards a small-pox hospital, the discretion committed to the Board is not limited to determining on what site, of what size, and according to what plan it shall be built, but involves the duty of considering and determining whether it shall be built at all.

The Appellants, in support of this construction of the Act

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founded strongly upon sect. 69, sub-sect. 2, which provides that expenses incurred for "the maintenance of patients in any asylum specially provided under this Act for patients suffering from fever or small-pox," shall be repaid out of the common poor fund. But that provision is not meant to add, and cannot be held to add to the powers previously conferred. It is not disputed that an asylum shall be provided and used for the treatment of small-pox patients, if no nuisance is thereby occasioned; and all that the Legislature has enacted by sect. 69, is that if and when such an hospital has been lawfully established, the expense of maintaining patients in it, shall be defrayed out of a common fund raised by contributions from all the parishes and unions comprised in the district, and not by the parishes or unions to which they are severally chargeable.

The clauses in question belong to a class of enactments of which abundant examples are to be found in the statute book, the main object of which is to legalise the application of public rates to purposes which would otherwise be *ultrà vires* of the bodies by whom these rates are administered. Such purposes are in themselves lawful; but it is not lawful to expend the money of the ratepayers without the express sanction of Parliament. And it appears to me that, in making provision with regard to asylums in the Metropolis, the Legislature has done nothing more than is requisite to place the authorities to whom it has committed the execution of that part of the Act, upon the same level as individuals in so far as the rights of third parties are concerned, but with the right, which individuals have not, to defray the costs by rates levied from the public.

I am accordingly of opinion that the judgments under appeal ought to be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th March, 1881.

Solicitors for the Appellants: *Few & Co.*

Solicitors for the Respondents: *Bischoff, Bompas, Bischoff & Co.*

[HOUSE OF LORDS.]

WILLIAM SPAIGHT AND JAMES SPAIGHT APPELLANTS;
AND
ROBERT TEDCASTLE . . . . . RESPONDENT.

H. L. (E.)
1881
Jan. 20, 27, 28; *March* 7.

Sea Damage—Compulsory Pilotage—Steam-tug.

Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is, at the same time, in tow of a steam-tug, the latter is bound to obey the orders of the pilot. In case of a mischief occurring to the vessel, occasioned directly by the conduct of the steam-tug, the tug (which had not noticed the pilot's signal), cannot in an action brought by the owners of the vessel for damage, set up, as a legal defence, contributory negligence, upon the ground that if the pilot, when the mischief was about to happen, had himself done a certain thing, the mischief might possibly have been avoided.

Bland v. *Ross* (*The Julia*) (1) commented on, and approved.

APPEAL against a decision of the Court of Appeal in *Ireland* which had (*diss.* Lord Justice *Fitzgibbon*) affirmed a judgment of the Irish Court of Admiralty.

The Appellants were the owners of a sailing ship the *Ruby*. The Respondent was the owner of a steam-tug the *Toiler*. The *Ruby* coming from *Quebec*, arrived near the *Kish* lighthouse in *Dublin Bay* on the 9th of December, 1878. The weather was squally. The *Toiler* came up and proposed to take the *Ruby* into harbour. The *Ruby* had on board a licensed pilot, whom by the law of *Dublin Harbour* the master of the *Ruby* was bound to employ. He told the master of the *Ruby* that the terms offered by the tug were proper, and the tug was engaged. After the tug had begun the labour of towing, the master of the *Ruby* left the deck, his vessel being, as he thought, under the absolute control of the licensed pilot. In going into the harbour the *Ruby* ran upon a bank in the bay called the *Burford Bank*, and sustained injury. A proceeding *in rem* was instituted by the owners of the *Ruby* against the owners of the tug to obtain compensation for this

(1) Lush. 231; 14 Moo. P. C. 210.

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injury, which the owners of the *Ruby* alleged had been occasioned by the fault of the tug. The owner of the tug put in defences which in substance set up a case of contributory negligence on the part of the *Ruby*, through the act of the pilot in not casting off the tow rope when the danger became imminent. The Court of Admiralty had sustained the defence, and on appeal the Lord Chancellor and Lord Justice *Deasy* agreed to affirm that decision, Lord Justice *Fitzgibbon* dissenting. This appeal was then brought.

Mr. *Butt*, Q.C., and Dr. *Boyd*, Q.C. (of the Irish Bar), were for the Appellants.

Mr. *Cohen*, Q.C., and Mr. *Burke* (of the Irish Bar), for the Respondent.

The evidence, and its effect in supporting the defence of contributory negligence, are fully considered and commented on in the judgments.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, I have had an opportunity of seeing the detailed examination of the evidence in this case which will be submitted to your Lordships by one of my noble and learned friends (Lord *Blackburn*); and your Lordships have before you the full discussion which that evidence received from the learned Judges in the Court below. My view of the main conclusions to be derived from that evidence being the same with that taken by Lord Justice *Fitzgibbon*, and by my noble and learned friend, I do not think it necessary to occupy your Lordships' time by going in detail over the same ground.

There is an important point of law, which (for some reason, that I do not at present understand) was not argued at your Lordships' bar, but which it would have been necessary to consider, if your Lordships had taken the same view of the effect of the evidence which was taken by the majority of the Judges in the Court below. It seems to have been assumed that the Plaintiffs, the owners of the *Ruby*, would have been answerable for

contributory negligence, not only of their own captain and crew, but of the pilot, whose employment was compulsory by law. If, in any case which may hereafter occur, it should be necessary to determine that question, the statute 17 & 18 Vict. c. 104, s. 388, and the opinions delivered in this House in the recent case of *Clyde Navigation Company* v. *Barclay* (1) will require attention. But for the present purpose, I think your Lordships need not enter into that question; because even if the employment of the pilot had not been compulsory, the conclusions to be properly drawn from the facts established by the evidence would have been such as, in my opinion, to make that distinction immaterial.

Great injustice might be done, if, in applying the doctrine of contributory negligence to a case of this sort, the maxim, *causa proxima, non remota, spectatur*, were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the Defendant, contributory negligence by the Plaintiffs cannot be established merely by shewing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the Defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect. The question is not whether it would have been wiser for the master of the *Ruby* to prevent the tug from taking such a course in the direction of the south buoy as might bring her so near as he actually came to the bank. If, taking that course (which the master of the tug on his own responsibility voluntarily and deliberately did), all danger might have been avoided by proper conduct and management on the part of both vessels at the proper time, the master of the *Ruby* was, in my judgment, entitled to assume that the master of the tug knew what he was about, and would do what was necessary to avoid getting too close to the bank, unless the contrary manifestly appeared. At the critical time the *Ruby* made all the

(1) 1 App. Cas. 790.

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signs which were possible to the tug; and if they had been followed, (as at first they were), I think it is the just conclusion from the evidence that no damage would have occurred. Upon the evidence I cannot see my way to hold that the *Ruby* then omitted anything which ought to have been done, or did anything which ought not to have been done.

My conclusion on the evidence is, that the judgment under appeal ought to be reversed; and I shall therefore move your Lordships to reverse it, and to remit the cause to the Court below, with a declaration that the Appellants are entitled to a decree for damages and costs, as prayed by the petition, together with the costs of the appeal below. And direct the Respondent to pay to the Appellants the costs of this appeal.

LORD BLACKBURN:—

My Lords, this was a cause of damage instituted by the Appellants, as owners of the barque *Ruby*, in the High Court of Admiralty of *Ireland*, against the Respondent, as owner of the steam-tug *Toiler*, to recover damages, because the *Ruby* was run aground on a shoal in the Bay of *Dublin*, called *Burford Bank*, in consequence, as is alleged, of the negligent performance of that duty which the owner of the *Toiler* had taken upon himself by having, through his master, named *Cavanagh*, entered into a contract to tow the *Ruby*. It is not in dispute that a contract of towage was entered into, nor that, whilst the *Ruby* was being towed by the *Toiler*, she took the ground and sustained serious damage. And it is not in dispute that at that time the *Ruby* was in charge of a duly licensed pilot, by name *Tallant*, whom the *Ruby* was obliged to employ,—pilotage in the Bay of *Dublin* being compulsory.

The judgment delivered by Lord *Kingsdown*, in a case in the Privy Council, clearly and accurately states the law applicable here. I mean the case reported under the name of *The Julia* (1), and also under the name of *Bland* v. *Ross* (2). In that case the tug sued the ship for damages for a collision. Lord *Kingsdown*, in delivering the judgment of the Privy Council, says:—

"When such a contract is made, the law would imply an engage-

(1) Lush. 231. (2) 14 Moo. P. C. 210.

ment that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each, and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one, without any default on the part of the other, no cause of action would arise; such an accident would be one of the necessary risks of the engagement to which each party was subject, and create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not, by any misconduct or unskilfulness on her part, contributed to the accident."

He states the four questions which arose in that case. Three of them are material for the consideration of this case:—"1. Did the accident arise from the misconduct of the ship? 2. Did the tug, by any misconduct on her part, contribute to the accident, or (what is in truth but another form of the same question) could she by using due diligence have avoided it? 3. If both of these questions are decided in favour of the tug, can the ship escape the consequences of her misconduct, on the ground that it is to be imputed solely to the pilot, and in no degree to the master or the crew?"

Those three questions were, in the case of *The Julia* (1), disposed of on the evidence. The first two, merely changing the parties from tug to ship, and *vice versâ*, were disposed of in this case by the Judge of the Admiralty and his assessors, who found first that the accident arose from the misconduct of the tug. The *onus probandi* on this issue lay on the Plaintiffs below, and as the duty of the tug was to carry out the directions received from the ship, and the pilot who was in charge of it, the tug would not be guilty of neglect of duty by pursuing an injudicious course, if it was pursued in obedience to the pilot's orders. So far as this issue is concerned, the misconduct or want of skill on the part of the pilot is relevant; but I think the counsel for the Respondent hardly

(1) Lush. 231; 14 Moo. P. C. 210.

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denied that there was ample evidence to justify the finding of this issue for the Plaintiffs.

The second question the Judge and his assessors answered in favour of the Defendants,—that the ship, by misconduct on her part, contributed to the accident. On this issue the burthen of proof lay strongly on the Defendants. I cannot but think that there was a misapprehension, on the part of those who tried the cause below, as to what would constitute contributory negligence; on this I will observe when I come to deal with the facts.

The third question, as it is stated by Lord *Kingsdown*, does not exactly arise here; but I think that the evidence is such as to raise this question. Supposing the first question to be decided in favour of the ship, and the second question also to be decided in favour of the ship as far as regards the conduct of the captain and crew, and all those for whose negligence the owner of the ship would be responsible to third persons, on the ground stated in *Quarman* v. *Burnett* (1), that they were persons whom "he had selected as his servants from the knowledge of, or belief in, their skill and care, and whom he could remove for misconduct, and who were bound to obey his orders,"—can the tug escape the consequences of its misconduct, on the ground that the pilot, whom the shipowner did not select, but was compelled by law to take, and for whose misconduct he would not have been liable to third persons, might, if he had exercised proper skill and care, have avoided the consequences of the tug's misconduct, and failed to do so? This is disposed of by the Judge of the Admiralty in *Ireland* in a single line. He says, "The ship, as I take it, is affected by the pilot's conduct." This is not a self-evident proposition.

The majority of the Court of Appeal in *Ireland* thought the Judge of the Admiralty right, on the authority of *Smith* v. *St. Lawrence Tow Boat Company* (2) (which, however, seems to me a decision that it was not a breach of duty in the tug in that case, to pursue a course which the pilot in charge of the *Silver Cloud*, if he did not order, at least consented to), and the *Energy* (3), which does seem in point. And to these I may add the case of *Thorogood* v. *Bryan* (4), in which the Court of Common Pleas in

(1) 6 M. & W. 509.
(2) Law Rep. 5 P. C. 308.
(3) Law Rep. 3 A. & E. 48.
(4) 8 C. B. 115; 18 L. J. (C.P.) 336.

1849 (consisting of very able Judges) decided that a passenger on a public conveyance (in that case an omnibus) was so far identical with his own conveyance, that he could not recover for an injury sustained by him from the negligence of a third person, if there was contributory negligence on the part of those conducting the conveyance on which he was a passenger. *Maule*, J., gives reasons, which are certainly not applicable to the case of a pilot whom the shipowner is compelled to take. He says, "On the part of the Plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. The passenger is not without remedy. But as regards the present Defendant, he is not altogether without fault. He chooses his own conveyance, and must take the consequences of any default of the driver, whom he thought fit to trust." This decision was very much questioned by the very learned editors of the fourth edition of *Smith's* Leading Cases (afterwards Mr. Justice *Willes* and Mr. Justice *Keating* (1)). Their remarks on it and the subsequent cases (2), in which it has been discussed, are collected in the seventh edition of that work (3). But the decision itself has never been actually overruled. The precise question, whether the principle on which it proceeds, if sound, is applicable to the case of a pilot, has never, that I can find, been discussed, though in the *Energy* it seems to have been acted upon.

Lord Justice *Fitzgibbon* in the present case glances at what is my difficulty, along with a good many others, which perhaps had more weight with him, when he says (4), "I regret that this case is the first to lay down that the captain of a tug, who has contracted to bring a ship to harbour with reasonable care, may, against orders or without orders, wilfully drag her over a bank which he knows to be dangerous, though he sees the pilot, whom

(1) Vol. i. at p. 220.

(2) *Tuff* v. *Warman*, 5 C. B. (N.S.) 573; 26 L. J. (N.S.) C. P. 263; *Vose* v. *The Lancashire and Yorkshire Railway Co.*, 2 H. & N. 728; *Waite* v. *The North Eastern Railway Co.*, El. Bl. & El. 719.

(3) At p. 300.

(4) Printed papers in the case, p. 145.

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he is bound to obey, vehemently endeavouring to convey some signal to him, and indicating that the ship is going aground, and that the owner of a ship so treated is to be deprived of all redress because the pilot (*whom it is not even in his power to select*) had not the foresight, or the presence of mind or the courage to cast his ship adrift, and at the approach of night, against a high wind with a rising tide, let her take her chance of avoiding alone the consequences of the admitted misconduct of the tug which was employed to conduct her safely home. I can only say that I entirely dissent from such a conclusion."

The counsel for the Appellants did not rest their case on this point of law, and it was not argued at your Lordships' bar. It is one of general importance, and, if it were necessary to decide it either way, I should wish to hear a farther argument on that point. But before putting the parties to that expense, I think it right to inquire whether, even if the ship is, for this purpose, affected by the pilot's conduct (a proposition which I neither affirm nor deny), the owner of the tug did in this case satisfy the onus cast on him of shewing that there was contributory negligence on the part of the ship. I have come to the conclusion that he did not. [His Lordship here gave a detailed statement of the evidence which led him to this conclusion.]

Now, on this evidence two questions arise. First, did the pilot make such signals that it was negligence and want of skill in the master of the tug not to understand, and at once obey? That the pilot meant to give him such signals is clear. And I should be strongly disposed to draw the conclusion that he did so, but it is, of course, possible that the pilot might have lost his head altogether, and made unintelligible signs, and those who heard the witnesses and saw the pantomime described on the notes as "witness made the signs with his hands," had better means of forming a judgment on this than I have. But I think this not material, for all are agreed that the master of the tug did at last obey and port his helm. Then the next question is, if he had continued to follow that course, would the *Ruby* have gone clear of the bank. She had got too near, dangerously near, to the bank, and I think it at least very doubtful if a vessel under canvas only could then clear the bank. But with the aid of a tug both to bring the ship's head

round more quickly, and to assist in checking the weigh of the ship towards the bank, which was not to leeward, a vessel assisted by a tug might get clear of the bank after she could no longer do so under canvas alone. I should have liked to have more distinctly the naval assessors' opinion on this point, which is one of seamanship; but I cannot find that they were asked, and probably, from not knowing the (perhaps artificial) rules by which the law of contributory negligence is regulated, they did not think it of so much importance as I think it was. Was the course which the tug then for a short time took one which would, if pursued, have taken the vessel clear? *Cavanagh*, the master of the tug, himself says that it would. And I find no one who says to the contrary.

If this was so, and I think we must take it to be so, there would have been no accident if the tug had not starboarded her helm. Was that negligence? I think it was very gross negligence. He excuses it by saying that the *Ruby* not having followed him he thought he must have misunderstood the previous signals. Now I think the evidence is very strong that the *Ruby* did follow him; and if he thought she did not, it must have been because (in the most lenient construction of his conduct) he did not wait to see whether she was doing so or not. I quite agree with what Lord *Kingsdown* said in The *Julia* (1) as to the advantages which those who see the witnesses have in forming an opinion as to anything depending on a conflict of testimony, and on the propriety of not setting aside their decision without strong grounds. And I agree that this observation has still more force where the question is one of seamanship, and the Court below has the assistance of nautical assessors. I am perfectly aware of what would be the probable fate of a ship which was trusted to my pilotage, and would therefore never think of acting on my own notion of what ought to be done, if I found that opposed to the opinion expressed by nautical assessors. But I do not think I have differed from them in holding that the starboarding of the helm by the tug was negligence, and was the cause of the accident. I also accept the finding that the pilot "was negligent, supine, and inactive," and that all the more readily, because I have

(1) Lush. 231; 14 Moo. P. C. 210.

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myself come to the same conclusion. And I will not quarrel with their finding that the captain of the *Ruby* was to blame in quitting the deck, though I am by no means clear that I should have come to that conclusion myself. But no negligence which was over before the tug negligently starboarded her helm, could be contributory negligence in the sense which is required to relieve the tug from the consequences of that negligence. Be it that there was negligence in the ship and those for whom the ship was responsible in letting her get so dangerously near the bank before the helm was ported, as complete as the negligence of those who, in *Davies* v. *Mann* (1), left the fettered donkey dangerously rolling in the road, it forms no defence to an action against the persons who, by want of proper care, have injured the ship. To make a defence on this ground it must be shewn that the injured party, or those with whom for this purpose he is identified, might, by proper care, subsequently exerted, have avoided the consequences of the Defendant's want of proper care. I do not think that in this case the pilot had presence of mind or skill, so as to know whether there was anything that could be done or not, but I am unable to see what a skilful person in charge could then have done. It is said he might have thrown off or cut the tow rope and wore ship under canvas, and the assessors say that he could have done so, and ought to have done so, on what they call the first occasion, when he was half a mile or so farther from the bank. But they do not say that there was still space enough to do so after the tug starboarded, and I rather think, with Lord Justice *Fitzgibbon*, that, by implication, they, finding he was to blame for not doing so on the first occasion, express an opinion that he was not to blame for not doing so on the second; and the evidence of the second mate is clear, that it was too late, that the space was too short. I do not attach much weight to the evidence of *Tallant*, the pilot, but he says the same at the end of the passage I have already read.

It is then said that the *Ruby* might have tacked and so got out safe. No case of this sort was made on the evidence, the only question asked being of one witness, whether the ship could have then tacked, and he answered "No." But says the Judge of the

(1) 10 M. & W. 546.

Admiralty: "There was a second occasion, and that was when the *Ruby* got closer and in more dangerous proximity to the bank. That was the second time the pilot was imperatively called upon to act. The assessors are of opinion that, with the assistance of the tug, the *Ruby* could have tacked and gone in a south-easterly direction, and so been in safety. It strikes me as odd that this question was not put to any of the witnesses but one, and that was to the second mate, and he says that she could not have tacked; if he meant that unaided she could not have tacked, then to this the assessors agree. But the witness was not asked whether she could with the tug's assistance have tacked. The assessors are of opinion that she could; that the pilot should have given orders for that purpose, and that he is culpable for not having done so. These are the two instances; but the assessors' opinion is that "from first to last he was negligent."

I should like to have asked the assessors whether, if the ship, being so near the bank as she was, had tried to tack and failed, she would not have come on the bank broadside, and at least run the risk of a far more serious accident than actually occurred; and if they had answered, as I have little doubt they would, that it was so, I would then have asked them, if a person of competent skill—I do not mean this pilot, who they clearly thought had not competent skill—but if a person of competent skill, having charge of the *Ruby* at that time, knowing where the bank was, and knowing that the person in command of the tug was one to whom it was, to say the least, difficult to convey orders, and who was not very quick in obeying them, might not, without shewing any want of skill, come to the conclusion that it was best to follow the tug and go over the bank, hoping that the ship would not have much injury from touching in going over the bank, rather than to try what was a somewhat delicate manœuvre, which, if it failed, was likely to cause a much worse accident?

No such question was asked, and I cannot tell how the assessors would have answered it. I think that unless that question was answered in the negative no case of contributory negligence was made out, even on the assumption that the ship was for this purpose identified with the pilot. The onus certainly lay strongly on the tug to make out this, and I think, on the evidence, it is

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not made out. I therefore come to the conclusion that, without expressing any opinion either one way or the other on the question of law, the judgment should be reversed.

LORD WATSON:—

Having carefully read the evidence, and also the opinion now delivered by my noble and learned friend, I feel no doubt whatever that the judgment of the Court below was erroneous and ought to be reversed.

Order appealed from reversed, and cause remitted to to the Court below, with a declaration that the Appellants are entitled to a decree for damages and costs, as prayed by the petition, together with the costs of the appeal below. Respondent to pay to Appellants the costs of the appeal to this House.

Lords' Journals, 7th March, 1881.

Solicitors for Appellant: *Pritchard & Sons.*
Solicitors for Respondent: *Waltons, Bubb, & Walton.*

[HOUSE OF LORDS.]

THOMAS CASTRO, otherwise ARTHUR ORTON, otherwise SIR ROGER CHARLES DOUGHTY TICHBORNE, Bart. . . . } Appellant;

AND

THE QUEEN . . . . . Respondent.

H. L. (E.) 1881 March 10, 11.

Indictment—Two Counts—Misdemeanor—General Verdict—Second Term of Imprisonment beginning at the end of the First.

An indictment for perjury contained two counts, charging perjury to have been committed by the Defendant on two different occasions, one in the progress of a trial, the other in an affidavit in Chancery. Both acts of perjury had the same object in view:—

Held, 1. That they were distinct offences, and a punishment might be inflicted in respect of each.

2. That though the offences were in this way distinct, they might both be included in the same indictment, and that a general finding of guilty on the charges contained in both counts was good.

3. That the full punishment of seven years penal servitude might be inflicted for each offence, and that the second term of penal servitude was properly made to begin at the termination of the first term.

4. The 2 Geo. 2, c. 25, s. 2, authorizes the Judge before whom a person shall be convicted of perjury, to order such person to be sent to a house of correction for seven years, there to be kept to hard labour; "and thereupon judgment shall be given that the person convicted shall be committed accordingly, over and beside such punishment as shall be adjudged to be inflicted upon such person, agreeable to the laws now in being:"

Held, that this statute did not impose on the Court the necessity of awarding any punishment previous to that of penal servitude, so as to give the sentence of penal servitude the form of an additional punishment.

The conclusion to a count "*contra formam statuti*" is now, by 14 & 15 Vict. c. 100, s. 24, no longer necessary.

THIS was an appeal against a decision of the Court of Appeal, which had affirmed a judgment of the Queen's Bench Division (1).

On the 8th of April, 1872, the grand jury at the Central Criminal Court found a true bill against *Thomas Castro, alias Arthur Orton, alias* Sir *R. C. D. Tichborne,* Bart., for perjury. The indictment contained two counts. The first count charged that

(1) Law Rep. 9 Q. B. 350; 5 Q. B. D. 490.

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on the 10th of May, 1871, at *Westminster*, before Sir *W. Bovill*, Lord Chief Justice of the Common Pleas, an issue, duly joined in an action of ejectment, came on to be tried, in which the Appellant was the claimant, and *Franklin Lushington* and others were Defendants, that the Appellant appeared as a witness for himself and was duly sworn, and gave answers in several matters (which were particularly set forth), and that the Appellant on his oath falsely answered in these matters, and so committed the offence of perjury against the peace of our lady the Queen, her Crown and dignity.

The second count charged that, on the 7th of April, 1868, a suit had been instituted in Chancery, in which the Appellant was the Plaintiff and the Hon. *Teresa Tichborne*, widow, and others were the Defendants, praying that in case it might be deemed requisite for him to take proceedings at law, for the recovery of the *Tichborne* estates, the Defendants might be restrained by injunction from setting up certain outstanding terms, &c., therein mentioned, and that on the said 7th of April, 1868, the Defendant made an affidavit in support of his motion in the said suit, and therein made certain false statements (which were fully set forth in the count), and did thereby commit perjury against the peace, &c., as before.

The Appellant pleaded Not guilty. The indictment was removed into the Queen's Bench. The trial, which began on the 23rd of April, 1873, and terminated on the 28th of February, 1874, took place before Lord Chief Justice *Cockburn*. The verdict was in the following form: "The jurors so empannelled, &c., on their oath say that the said *Thomas Castro*, otherwise called, &c., is guilty of the premises on him above charged in and by both counts of the indictment aforesaid above specified, in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him." The judgment that followed was, "That the said *Thomas Castro*, otherwise, &c., for the offence charged in and by the first count of the said indictment, be kept in penal servitude for the term of seven years now next ensuing. And that for and in respect of the offence charged in and by the second count of the said indictment, he, the said *Thomas Castro*, otherwise, &c., be kept in penal servitude for the farther term of seven

years, to commence immediately upon the expiration of his said term of penal servitude for his offence in the first count of the said indictment."

On the 13th of December, 1879, Sir *John Holker*, Her Majesty's then Attorney-General, granted his fiat for a writ of error, which was afterwards issued, and the case was argued in the Court of Appeal, when judgment was given for the Crown (1). This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *Atherley Jones* (Mr. *Hedderwick* and Mr. *Spratt* were with them), for the Appellant, renewed the arguments used in the Court below, and, in addition to the cases there cited, mentioned and commented on *Reg.* v. *Roberts* (2), *Reg.* v. *Rhodes* (3), and *Rex* v. *Ellis* (4).

The Attorney-General (Sir *H. James*), *The Solicitor-General* (Sir *Farrer Herschell*), Mr. *Poland*, and Mr. *A. L. Smith*, appeared for the Crown, but were not called on.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, your Lordships have listened attentively to the arguments which have been offered with much ability and zeal at the bar of your Lordships' House in support of this appeal, but I believe your Lordships are all agreed that it is unnecessary to call upon the learned Attorney-General to answer those arguments.

There have been suggested, as I reckoned them, six objections to the judgment in question; and I will shortly deal with those objections, not exactly in the order in which they were presented in the argument, but reserving until the last that which appeared to be chiefly relied upon by the leading counsel for the Appellant. The first objection was, that there was no finding of guilty upon each of the counts; but that there was a general finding of guilty upon the charges contained in both counts. That was founded upon the language of the verdict, "that the said *Thomas Castro*," and so on, "is guilty of the premises on him above charged in and

(1) 5 Q. B. D. 490.
(2) Carth. 226; 1 Show. 389; Comb. 193; 4 Mod. 100.
(3) 2 Ld. Raym. 886.
(4) 6 B. & Cr. 145.

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by both counts of the indictment aforesaid, above specified in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him." I think it unnecessary to say more upon that objection, than that it appears to me to impose a perverse and unreasonable interpretation upon the language of the verdict, which mentions both counts, in a sense, in my opinion, clearly applicable to each count.

The second objection was, that the indictment did not conclude with the words, "against the form of the statute," &c. Before the passing of the Act 14 & 15 Vict. c. 100 (s. 24), it appears undoubtedly to have been law—highly technical, but still well-settled law—that, in order to justify the infliction of a statutory punishment for an offence which was also a common law offence, it was necessary to conclude with a reference to the statute or statutes. If that was not done, the indictment was taken to be simply an indictment at common law, and a common law punishment only could be inflicted. But for the purpose of obviating the inconvenient and unreasonable consequences of that and some other technical rules relating to the forms of pleading in criminal cases, the statute of 14 & 15 Vict. c. 100, was passed; which said, in sect. 24, that an indictment should be sufficient without these forms. It is argued that the only effect of this is to save such an indictment from being demurrable, or bad and liable to be quashed; but that it is not enough to enable a statutory penalty to be inflicted when the statute is not referred to. I am of opinion that to place any such narrow construction upon such words in a remedial statute, which was intended to get rid of unreasonable technicalities not necessary for any substantial purpose of justice, would be a great mistake on your Lordships' part. When the statute says that an indictment shall not be held insufficient for want of such a form, I understand that to mean that it shall not be held insufficient for any purpose for which it would have been sufficient if the form so dispensed with had been observed. That, my Lords, I think sufficiently disposes of the second objection.

That which I think it would be convenient to take as the third objection arises upon the language of the statute 2 Geo. 2, c. 25. It is said that this sentence is bad, because the punishment inflicted is not additional to some other punishment which

might have been inflicted if the statute 2 Geo. 2, c. 25, had not been passed. My Lords, that objection has not reference to one count more than to another, but it would apply, if true, to the judgment on each count. But I think there is no foundation for it. It is based upon these words in the 2nd section of the statute: "And the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, be it farther enacted by the authority aforesaid, that, besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or Judge, before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury, according to the laws now in being, to order such person to be sent to some House of Correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported" (I do not think we need pursue the alternative of transportation): "and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being."

My Lords, even if the punishment which the laws, in force for the time being, permitted to be inflicted for perjury before that statute was passed, had been altogether *diversi generis* from that which would be suffered under this clause, I should greatly doubt whether it would be a reasonable construction of these words to hold that they require cumulative punishments, both under the common law or the statute of Elizabeth, and also under this Act of Geo. 2, to be inflicted in all cases in which that Act is put in force. I think it would be more reasonable to hold, that the Legislature intended to leave the Judge such discretion as he had before with regard to any other penalties, either by common law or by statute, and only to enable him to increase the quantum of punishment, within the limits authorized by the statute, if he should think it proper to do so. But I do not think, according to the view which I take of the matter, that even that question need now be determined; because the substance of the provision is this: There was power, both at Common Law and under 5 Eliz. c. 9, to punish perjury by imprisonment; and what this statute

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does is to prolong, within certain limits, the term of imprisonment, and to enable the Judge to superadd to imprisonment, hard labour, during that term, in the House of Correction. When, therefore (as in this case), the convict is sentenced to imprisonment, and to something more (viz. penal servitude, now substituted for transportation), he undergoes the common law penalty, with an addition to it, authorized by this statute. That there should necessarily be two distinct and separate terms of imprisonment, does not appear to me to be required, either by the letter, or by the spirit, of the statute. The objection is, no doubt, one which a prisoner convicted and sentenced is perfectly at liberty to urge if he can make it good. It means, however, not that he has received too severe a punishment, but that he ought to have received more punishment still, and the interpretation which I propose to your Lordships to put upon the words of the statute is not adverse to persons sentenced for criminal offences of this kind, but is one of greater leniency and more in their favour.

The fourth objection, touched rather lightly by Mr. *Benjamin*, but somewhat more strenuously urged this morning upon your Lordships by the junior counsel for the Appellant, was that there was really, in this case, only one offence charged by both counts. With all the ingenuity and zeal of both learned counsel, they failed to make me clearly comprehend how they intended to put that matter before your Lordships. It appears to me to be impossible on principle (and no authority was cited for the proposition), to hold that perjury committed in a Chancery suit in 1868, and perjury committed at the trial of an action before the Lord Chief Justice of the Common Pleas in 1871, are one and the same offence; although the Chancery suit and the action at Common Law had a common object, that object being to substantiate a claim to certain estates. I should be of the same opinion even if all the assignments of perjury on each occasion had been exactly the same; they would still have been two distinct perjuries, committed at two distinct times, in two distinct legal proceedings. But in point of fact you find, in addition to some similar assignments of perjury upon each occasion, others upon the second occasion, different from those upon the first. No more need be said about that objection.

Next, it has been zealously argued by the junior counsel for the Appellant, that, however many counts there might be, whether charging distinct offences or not, only one judgment could properly pass upon one indictment for misdemeanor. Not only was no authority cited for that proposition, but the authority which was, for a different purpose, relied upon by Mr. *Benjamin*—the case in this House of *O'Connell* v. *The Queen* (1)—clearly establishes the contrary. I do not think it necessary to do more than read two or three passages from the opinions delivered in that case. Lord *Wensleydale*, then Baron *Parke*, in his opinion (2) says this, "If this point were to be considered independently of the understood rule upon this subject, and supposing that no such rule existed, I should say, that where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. The practice has grown up, and much increased in modern times, of introducing many counts into one indictment; and though we know practically that these are most frequently descriptions, only in different words, of the same offence, they are allowable only on the presumption that they are different offences, and every count so imports on the face of the record, as Mr. Justice *Buller* states in *Young* v. *Rex* (3); though the late Mr. Justice *Taunton* intimated a different opinion (I think without sufficient ground) in *Rex* v. *Powell* (4). The question then being how these counts are to be dealt with on the face of the record, I should have said, *à priori*, that it was the duty of the Court acting between the Crown and the accused, and the right of the accused, to have the charge of each offence (for as such I must treat it) properly and finally disposed of on the record, so that the accused as well as the Crown might know for what offence the punishment was inflicted and for what not."

Lord *Denman* said (5): "With regard to several counts in criminal cases, the objection may be entirely avoided by the Court passing a separate judgment upon each count, and saying, 'we adjudge that upon this count on which the prisoner is found guilty, he ought to suffer so much; that upon the second count he ought,

(1) 11 Cl. & F. 155.
(2) 11 Cl. & F. at p. 295.
(3) 3 T. R. 98, at p. 106.
(4) 2 B. & Ad. 75, at p. 78.
(5) 11 Cl. & F. at p. 377.

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on being found guilty, to receive such a punishment; whether the count turns out to be good or not, we shall now pronounce no opinion." Lord *Campbell* added (1): "It is an utter mistake to suppose that there is only one *corpus delicti* which is made the subject of several counts in one indictment. Even with respect to felony, the law supposes a separate offence to be charged in each count; and in misdemeanors there are not unfrequently in the different counts entirely different offences, of different sorts, committed at different times." And my Lords, I may add, that the decision of this House in that case was, that if there were not a separate judgment on each count, then, if there were any one count bad at law, the judgment, being incapable of being referred to the good counts alone, must be regarded as distributed among them all, and the whole proceeding would fail. I heard this point argued, by Mr. *Atherley Jones*, with some degree of surprise, because I certainly understood his learned leader, Mr. *Benjamin*, to have more than once given it up in the course of his argument.

That brings me to the remaining point: that a cumulative sentence of imprisonment for two periods of seven years, one on each count, and each for a distinct offence, could not properly be given; because the maximum length of imprisonment, under the Act of Geo. 2, for any offence of this kind, is seven years; and two periods of seven years together make fourteen.

This objection would be perfectly good if the law did not permit a sentence, upon the second count for the second offence, to be so pronounced as to take effect, by way of commencement, after the end of the term of imprisonment to which the prisoner was sentenced upon the first count. But it was decided in this House, in the case of *Rex* v. *Wilkes* (2), as long ago as 1769, that when there is a subsisting sentence of imprisonment (in that case it was under a distinct indictment, both indictments coming simultaneously for judgment before the Court), the proper course is to pronounce, (if imprisonment be the penalty,) a second sentence of imprisonment, to commence at the expiration of the first. I will shortly refer to the reasons for that conclusion, as they were stated by the Chief Justice, Sir *Eardley Wilmot*, in

(1) 11 Cl. & F. at p. 415.

(2) 4 Burr. 2527, 2577; 4 Bro. P. C. 360, 367; 19 How. St. Tr. 1075, 1136.

delivering the unanimous opinion of the Judges, upon the questions submitted to them by this House. The third question was, "Whether a judgment of imprisonment against a Defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law?" The learned Judges returned an affirmative answer in the terms of the question; and thereupon this House affirmed the judgment, which had been in fact so pronounced. That was a case of misdemeanor; and the material passages, which I think it worth while to refer to in Chief Justice *Wilmot's* opinion, occur in the report in *Howell's* State Trials (1): "In treasons and felonies" (said that learned Judge), there is "a certain known judgment which cannot be departed from, viz. in the present tense of the subjunctive passive; but in misdemeanors, where punishment is discretionary, the limitation as to time seems only to be, that the punishment shall take place before a total dismission of the party: a punishment shall not hang over a man's head when he has been once discharged; that is properly a punishment *in futuro*. But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former, or immediately after the end of it." He added, that, if the punishment had been inflicted by imprisonment for twelve months, then, as the prisoner was already sentenced to ten months, it would have been only an imprisonment for two; in other words, that the power which the Court thought fit, having discretion to exercise, of awarding a period of twelve months' imprisonment for the second offence, could not have been exercised, otherwise than by postponing it till after the expiration of the first.

I pause to observe, that, in a case like the present, where the statutory power is to imprison for a term not exceeding seven years, if two simultaneous sentences were passed, both for the maximum period, and both commencing at the same time, it would be manifest that for the second offence there would be no punishment at all. "We cannot" (said the Chief Justice), "explore any mode of sentencing a man to imprisonment who is

(1) Vol. xix. at pp. 1133, 1134.

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imprisoned already, but by tacking one imprisonment to the other, as is done in the present case."

So far, therefore, my Lords, as relates to misdemeanors, and, subject to the question whether this authority would apply when the aggregate of the two punishments exceeds, in point of time, that which there would have been power to award for either offence alone, subject to that distinction, the case of *Rex* v. *Wilkes* (1) in this House is clear and distinct authority in favour of the proposition, that, when a man is found guilty of two misdemeanors, being distinct and separate offences, (I apprehend it makes no kind of difference whether it be by two indictments simultaneously tried and found against him, or upon two counts in one and the same indictment,) there not only a competent but the proper course was, and is, to pronounce a second sentence of imprisonment (assuming it to be within the power of the Court as to duration), to commence and begin after the expiration of the first.

If that be so, I ask what difference can it make, that a statute has said, that for a single offence, instead of having a discretionary power to imprison for any term that may be thought fit, the Court shall have power to imprison for a term not exceeding seven years? The only difference it makes is this: that, for each offence, the Court can go as far as seven years, and cannot go farther; but the moment it is ascertained that it is proper for the Court to pronounce a second sentence for a distinct offence, commencing after the expiration of the imprisonment to be suffered for the first, then the sentence so commencing, being for seven years only, is within the statutory limit. The moment you understand the point decided in the case of *Rex* v. *Wilkes* (1), it is seen to be a fallacy to mix up the two together, as if there had been only one offence, and to say, that, because only one term of seven years' imprisonment can be inflicted for a single offence, therefore only seven years in the aggregate can be inflicted for two offences. The statute has not said so; and to say so would be to deprive the Court of the power of postponing the commencement of the second sentence. If the argument were good for anything it would be good to cut off, not only the whole,

(1) 4 Burr. 2527, 2577; 4 Bro. P. C. 360, 367; 19 How. St. Tr. 1075, 1136.

but every fraction of the seven years. The first sentence being for the full period of seven years, the result would be that it would be impossible, according to that argument, to pronounce any sentence at all of imprisonment for the second offence.

The subsequent action of the Legislature shews how completely the law, laid down in *Wilkes' Case* (1), has been since recognised, and extended. By the Act 7 & 8 Geo. 4, c. 28, the same rule was extended to cases of felony; there being added, *ex cautela,* to the end of the 10th section of that Act (which expressly said that when a person was "already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence to commence at the expiration of the imprisonment to which such person shall have been previously sentenced,") these words, "although the aggregate term of imprisonment may exceed the term for which the punishment could be otherwise awarded." I have left out the alternative of transportation, for shortness' sake. I apprehend, my Lords, that, if those last words had not been there, the effect would have been practically the same.

After the passing of that statute occurred the case of *Rex* v. *Robinson* (2), in which thirteen learned Judges were of opinion that, there being two distinct misdemeanors charged in the same indictment in different counts, and one sentence for two years imprisonment passed, the judgment was bad; because, by statute, one year was the maximum term which the Court had the power to inflict for such an offence. But all the thirteen Judges are stated to have been agreed, that the sentence would have been right if there had been two consecutive sentences of one year's imprisonment each.

After that, another Act of Parliament (11 & 12 Vict. c. 43) was passed giving justices, in the exercise of summary jurisdiction in criminal cases, a similar power to that which had been given to the Courts by the Act of the 7 & 8 Geo. 4. It said (s. 25) that, where justices upon information should adjudge a Defendant to be imprisoned, and the Defendant should "be then in prison undergoing imprisonment upon a conviction for any other offence, the

(1) 4 Burr. 2527, 2577; 4 Bro. P. C. 360, 367; 19 How. St. Tr. 1075, 1136.
(2) 1 Mood. C. C. 413.

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warrant of commitment for the subsequent offence shall, in every such case, be forthwith delivered to the gaoler to whom the same shall be directed;" and it should be lawful for the justices issuing it, if they thought fit, to award imprisonment for such subsequent offence, which should commence at the expiration of the imprisonment to which such Defendant should have been previously adjudged or sentenced. The Legislature did not add, in that statute, the words, "although the aggregate term of imprisonment should exceed the term for which the punishment might otherwise be awarded."

A question under that statute came before the Court of Queen's Bench, in the case of *Reg.* v. *Cutbush* (1); and the only difficulty that was felt there by the learned Judges (if any difficulty was seriously felt) was this: that the language of the earlier statute was, "wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime," and the words of the later statute were, "such Defendant shall be then in prison undergoing imprisonment." The argument was, that if the man had not actually got into prison, although a sentence of imprisonment had been pronounced upon him, the clause did not apply. Lord Chief Justice *Cockburn* stated, after communicating with the other Judges, that the practice of the Judges, as far as living judicial memory went, under the earlier Act (7 & 8 Geo. 4), whenever more cases than one of felony were established against a man, and he was convicted of them at one and the same time, had been to make the sentence of imprisonment for a second offence commence at the expiration of the sentence previously awarded for the first, although the convict had not actually been in prison. The learned Chief Justice, although admitting that there was some technical difficulty, not in any other part of the Act, but in those particular words which I have read, yet thought the reason and substance of the case, in addition to the authority derived from the exposition of the earlier statute by uniform practice, sufficient to justify the conclusion that cumulative sentences might be awarded under those statutes, although the man had not already found his way into prison; and when, in point of fact, one sentence was passed practically at the same time as the other.

(1) Law Rep. 2 Q. B. 379.

The practice, therefore, as far as can be ascertained from any of the authorities or from any of the books, has been uniform in favour of consecutive cumulative sentences of this kind; and this practice has been approved and extended by the Legislature.

I believe I have now dealt with every point which it is material for your Lordships to consider in this case; because, with regard to the decision in the State of *New York*, in the case of *Tweed* v. *Lipscombe* (1) it is sufficient to say that it proceeded upon *New York* law, and not upon English law (2). The cardinal proposition upon which it depends is one, which, if the view I have submitted to your Lordships is correct, the law of *England* rejects, namely, that only one sentence can be pronounced upon a single indictment.

For these reasons, and bearing in mind that both the Courts, before which this question has already come, have unanimously agreed in their determination that there is no error in this record, I must now move your Lordships to affirm the judgment of those Courts, and to dismiss the appeal.

LORD BLACKBURN:—

My Lords, notwithstanding the very considerable time which has been occupied in the argument, I have never been able from the beginning to the end to entertain the least doubt that in this case the judgment ought to be affirmed.

The first point which has been made on behalf of the Plaintiff in error I think requires only to be stated to answer itself. It has been endeavoured to be said that when there was in the Court of Chancery a proceeding pending to set aside some outstanding term in order to permit a trial at law in an action of ejectment, and in the course of that the Defendant, who is now the prisoner, being sworn, committed wilful and corrupt perjury for the purpose of misleading the Court of Chancery in that suit, that was not a different offence from the offence he committed afterwards at the trial of ejectment in swearing falsely and committing wilful perjury with the intent to mislead the Court that was trying the question of ejectment; or rather that the two offences were sub-

(1) 15 Sickel's N. Y. App. Cas. 559.
(2) The report shews, and the head-note states, that "the English law and cases" were "distinguished."

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stantially the same. It is said that they were substantially the same offence, because both perjuries were committed in suits in which the ultimate object was to recover certain estates situated, I believe, in *Hampshire* and *Dorsetshire*.

Taking that to be the point, and stating it in that way, it does seem to me, upon the face of it, to be difficult to state anything which would make it more obviously wrong than the mere statement of the case does. We have nothing whatever to do with the ultimate object of the perjury. The crime of perjury was complete as soon as the man wilfully and falsely swore a matter with the intention to mislead the Court of Chancery. The crime of perjury was complete when at a subsequent time the same man wilfully and intentionally made a false statement on oath, with intent to mislead the Court of Common Pleas. No doubt his object in each case was to recover the same estates. In like manner, in the case which was put by way of illustration, the object of a man who breaks open a house in the country with the intention to steal a jewel case, and finding that the lady has carried it off to *London* goes off to *London* and breaks into a house in *London* and gets the jewel case, his object in each case is to get the jewels, but no one will dispute that the two housebreakings are two crimes. It would have been quite possible, if the Legislature had been so wildly absurd, to have worded the Act of Geo. 2 in such a way as to say that, when a man has with one object committed perjury, and commits afterwards any number of other perjuries for the same object, the aggregate punishment shall never under any circumstances exceed the seven years—as if all had been but one perjury. Such a thing if properly said by the Legislature and sufficiently expressed, would of course be valid; but it is not pretended that there is a word in the statute of Geo. 2, which can, by any torturing in argument, afford a basis for that proposition.

The next point I think, namely, that the words "*contra formam statuti*" were not inserted here, rests upon one of those technical rules which have been most properly abolished by the Act of the 14 & 15 Vict., and I think I need say no more upon that than that that Act clearly said, in effect, that where any indictment would have required "*contra formam statuti*" before that Act was

passed, it shall hereafter be just as good and sufficient for all purposes, though without those words, as if it had contained them.

The next point, my Lords, is this: It is attempted to be said that the statute of Geo. 2 requires that before the Court can pass a sentence of penal servitude, it shall first pass a sentence such as might have been passed before that Act. I can only say that I cannot construe the words as meaning that. The words of the statute seem to me to express very plainly that the Court may give this punishment, and then the Act proceeds to give the form of judgment and says that the prisoner may be sentenced to transportation (for which penal servitude is now substituted), and that may be done in addition to any punishment which shall be awarded by the existing law. That means, I think, in addition to any punishment which is given, if there be any other punishment given. It does not mean that such a punishment shall necessarily be given in order to be a foundation for the other. If it did so, the only effect would be that the sentence before the House should be amended by adding a fine of one shilling or an hour's imprisonment, or anything else the House might please. But I think it is quite unnecessary to do that, for I feel clear (agreeing there with the Court below) that the construction of the Act is not that which is contended for by the Plaintiff in error.

Then, my Lords, we come to what is more nearly approaching to something of substance, if it is really well founded. I must say at once I totally disagree with what has been repeatedly asserted by both the learned counsel at the bar. I totally disagree that the pleadings at Common Law in a criminal case and a civil case were in the slightest degree different. I am speaking of course of the time before the Judicature Acts passed which swept them all away. Many enactments had from time to time been passed, relieving the strictness of pleadings in civil cases, which did not relieve them in criminal cases; but the rules of pleading at Common Law were exactly the same in each case. The course taken with regard to an indictment was this: The Queen having sent her commission to the grand jury, or any other commission to a proper tribunal, the tribunals so authorized presented all the offences that came to their knowledge; if it was brought sufficiently to their knowledge that a man had committed

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ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and if there were many other persons (as generally there are) it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that, process could be issued against a man so charged, to bring him upon his trial before a petty jury, to try whether he was guilty of those offences so charged or not.

Now, at Common Law there was no objection whatever, in point of law, to bringing a man who was charged with several offences, if those charges were all felonies, or were all misdemeanors, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony and in misdemeanor, and therefore felony and misdemeanor could not be tried together; but any number of felonies and any number of misdemeanors might. The contrary was asserted by the learned counsel, but, though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things, was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Whenever it would be unfair to a man to bring him to trial for several things at once, an application might be made to the discretion of the presiding Judge to say, "Try me only for one offence, or, try me only for two offences; if one was the real thing let me be tried for one and one only," and wherever it was right that that should be done the Judge would permit it. For these mixed motives it was well established by a long series of decisions, (I confess I doubt whether they were right at first, but certainly they have been both well established now and sanctioned by statute—that is quite clear,) that where the several charges were of the nature of felony, the joining of two felonies in one count was so, necessarily I may say, unfair to the prisoner that the Judge ought, upon an application being made to him, to put the prosecutor to his election and send them

to two trials. It never was decided, even in felony, that, if that application for the election was not made, the joining of several felonies, that is to say, the taking several felonies which had been found together, and trying those several felonies before one petty jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although, if the proper application had been made at the proper time, in a case of felony, the party prosecuting would have been put to his election or made to take one felony only, and not both at the same time. But in cases of misdemeanor it was by no means a matter of course that that should be done. I think that, if the Judge, upon an application made to him, had been satisfied that to try the man for several misdemeanors together would work injustice to the prisoner, he had a perfect right to say, "I will not work this injustice by trying them together, let us diminish them in number and try a reasonable number and no more." I do not know whether that was ever done in a case of misdemeanor, but I feel very little doubt that it may have been.

I think that in such a case as the American case (1) which was cited, where a man was called upon to answer before one jury at one time for 200 offences, the man might not unreasonably have said, "That is too much to put a man upon his trial for, select five or six, try me on those, let the rest stand over." I do not see that that that would be at all an unreasonable application. And in the present case, if an application had been made to the Court of Queen Bench to put the party to his election, and if it had been said "I cannot be fairly tried for one offence of perjury committed in *Middlesex*, if at the same time I am to be tried for another perjury committed in *London*, therefore there must be two separate trials;" if such an application had been made the Judges of the Queen's Bench would doubtless have said, We will listen to the arguments that may be urged in its favour. What they could possibly have been I do not know, but no such application was made. The prisoner was tried upon the two counts before one petty jury. They were taken both together, and then the result was that he was found guilty upon both.

Something was attempted to be argued upon the wording here,

(1) *Tweed* v. *Lipscombe*, 15 Sickel's New York Ap. Cas. 559.

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namely, that he was found "guilty of the premises" in both counts, to the effect that that did not mean the premises charged in each of the counts, but meant only (if I understand the argument rightly) such premises as were charged not only in the one but also in the other. In the first place, that is not the meaning of the words; and, secondly, it would be utterly absurd because the one count related to things which happened in *Middlesex*, and the other related entirely to things which happened in *London* three years before, therefore there could be nothing identical in the two.

But he was found guilty, and then came the question what was to be the sentence. It is clear that if the Court had pleased to grant an application these two counts might have been tried, the one in *London* before a *London* jury and the other in *Middlesex* before a *Middlesex* jury; but for the Act relating to the Central Criminal Court, which gives that Court jurisdiction over both *London* and *Middlesex*, they must have been so tried. But even now they might have been so tried, and if they had been so tried, and if each jury had found a verdict of guilty on the counts brought before it separately, *Rex* v. *Wilkes* (1) would have been absolutely in point as to the sentence. There would not have been a pretext for saying there was the least difference.

But then it is put in the argument in this way, that when they are both tried before one jury, and when the prosecutor has not been put to his election, but the trial for both offences has taken place together, the consequence must be that the prisoner is not to be punished in the same way as he would have been if he had been tried for each before two separate Judges, and he is therefore entitled to get off with less punishment. Why? I am sure I cannot conceive, nor can I see that any authority has been cited for that, at any rate in the English law, nor does it proceed on any reason. In regard to the American case (2) which was cited, it might be enough to say that I observe that the American case proceeds upon the express ground that the Court was acting upon *New York* decisions, subsequent to the Declaration of Independence,

(1) 4 Burr. 2527; 19 How. St. Tr. 1075; 4 Bro. P. C. 360.

(2) *The People ex rel. Tweed* v. *Lipscomb*, 15 Sickel's New York Ap. Cas. 559.

and upon *New York* statutes, and not upon English rules or English law. I dare say that decision may be right according to those *New York* decisions and statutes, but the decision does not apply here. They say that according to their view of the *New York* statutes and the *New York* decisions, where there is but one trial before one jury, it must be for one offence, and for one offence only, and upon that they all rest. They, logically enough, say, if that is granted where there are sentences passed for more than one offence, all but one must be *ultrà vires*; accordingly they held that the power of passing a sentence was exhausted by the first sentence. I leave it to the American Judges to say whether that was right or not according to American law. I do not pretend to express an opinion on that, but I am quite clear that it is not English law. I think the English decisions are all the other way, and the reason of the case is, to my mind, quite clearly the other way.

Now I will mention but one or two cases which prove it. I will not quote them at length. The first is *Young* v. *The King* (1), where the law is laid down in the way I have stated, that it is not a matter of right and law that they shall not be tried together, but only a matter of election. Then comes *Rex* v. *Jones* (2), where Lord *Ellenborough* both laid down the law as I have stated it, and acted upon it. Then *Rex* v. *Kingston* (3), where Lord *Ellenborough* again repeats the doctrine; and lastly *Rex* v. *Robinson* (4), which has been already cited, where it was said that the doctrine of *Rex* v. *Wilkes* (5) ought to have been applied to a case where there were two misdemeanors in separate counts tried together before one jury. My Lords, taking all those cases together, I myself can feel no doubt at all, that, by the English law, and going by that alone, there is not a pretence for this writ of error.

LORD WATSON:—

My Lords, after hearing the very ingenious arguments on the part of the Appellant, I have come to the same conclusion as

(1) 3 T. R. 98.
(2) 2 Camp. 131.
(3) 8 East, 41.
(4) 1 Moo. C. C. 413.
(5) 4 Burr. 2527; 19 How. St. Tr. 1075; 4 Bro. P. C. 360.

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your Lordships that there has been no reason whatever shewn for reversing the judgment now under the review of the House. The view I take of the various objections which have been urged against the validity of this verdict, and sentence, has been so well expressed already that I do not feel justified in adding more than a few words to what has already fallen from your Lordships.

The question as to what constitutes a separate offence where there has been a repetition of acts of the same character may at times involve questions of extreme nicety. It is unnecessary to deal with any of the cases such as have been suggested in the course of argument, as to whether statements differing in their character, made by a person under oath upon the same occasion, will constitute separate acts of perjury when falsely made. It is quite unnecessary to consider that in the present case. I have no hesitation in holding that where at two different times, at different places, in different suits, and under the sanction of two different oaths, the same man repeats the same false statement, he thereby commits two separate acts of perjury, two different crimes; and I do not think it possible to bind these up together as one transaction, as was suggested in the able argument of the senior counsel for the Appellant. You cannot make them *partes ejusdem negotii*, when so separated in time and place and circumstance, by the mere fact that the person who committed perjury on each of those occasions was actuated in both by the same motive and had the same improper object in view.

My Lords, I think the criticism upon the terms of the sentence is quite unfounded, and that it must be taken that these words import, as according to their natural signification they do, in my opinion, import, that the jury thereby found the accused guilty of each of the separate charges of perjury in this indictment preferred against him.

I shall not refer to the argument founded on the absence of the words "*contra formam statuti*," or to that founded on the statute of 2 Geo. 2, or the argument which we have heard from the learned junior counsel to-day, because those have been entirely disposed of by the observations which have already fallen from your Lordships.

The last, and what appeared upon the argument of Mr. *Benjamin*

to be the most important consideration which the counsel for the Appellant had to urge upon his behalf, was, that where, upon one indictment, there are two separate charges *ejusdem generis*, and the prisoner is convicted of both, if there be a statutory limit to the punishment which may be inflicted for one of those offences, that is to be the measure of all the punishment that can be inflicted upon him for more than one offence.

Now, my Lords, so far as I could follow the argument, there is an important rule of qualification which must be observed, and that is, if for each offence the statute says you shall inflict a sentence of not more than seven years of penal servitude you cannot for the two offences so frame the sentence as to exceed that limit. For that proposition, which seems at first sight a very startling one, and does not in my view lose that character upon a closer inspection, no authority whatever was cited.

At length, at the close of his argument, an appeal was made by the learned counsel to an American case, not, of course, as to an authority, because I take it that a judgment of a Court in *New York* is not an authority in a case arising in *England*, with regard to English rules of procedure, but as a decision of learned Judges that ought to influence the House to come to the same conclusion in the present case as that which the American Court arrived at in the case of *Tweed* v. *Lipscombe* (1). But that case, even if it were receivable as an authority, does not appear to me to be in the least degree an authority for the proposition in support of which it was quoted. What was decided there was that the law of *America* differs from the law of *England*, and one of the Judges expressly puts it that because of that difference the English decisions were of no authority in *America*; and I should have thought that the converse of that proposition would be equally true, namely, that the decisions in *America*, there being a difference between the laws of the two countries, would be of no authority here.

But assuming the case of *Tweed* v. *Lipscombe* (1) to be an authority, what does it come to? It comes to this, that in prosecutions for misdemeanor in *America* you can only proceed for one offence upon each indictment; and if you desire to have cumulative

(1) 15 Sickel's New York Ap. Cas. 559.

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punishment, extending to more than one statutory punishment, you must bring more than one separate indictment. The inference which I draw from the words used by the two learned Judges who decided that case is this, that you might have more than one penalty, of the full amount, tacked together, if you bring separate proceedings for that purpose. But then, my Lords, in *England* it is not necessary to bring these two separate proceedings in order to try one criminal for a misdemeanor, and I see no reason whatever, even if I accept that decision as law, for holding that if you can tack together two periods of the full amount, one for each offence, when you try by separate indictments, the same may not be done when two offences are tried under the same indictment. And still farther, it humbly appears to me that amongst the cases cited at the Bar there is to be found not only authority, but ample authority, for the proposition that such a sentence is sustainable and is good according to the law of *England*.

My Lords, had there been any serious doubt or difficulty attending these questions of criminal law which have been raised at your Lordships' Bar, I should have given my opinion with very great hesitation and diffidence, but, looking to the very unsubstantial character of the objections which have been stated to this conviction and sentence, I cannot say that I feel the least hesitation in expressing my concurrence with the views which have been expressed by your Lordships.

Judgment appealed from affirmed, and appeal dismissed.

Lords' Journals, 11th March, 1881.

Solicitor for Appellant: *Edmund Kimber.*
Solicitor for Respondent: *Solicitor to the Treasury.*

[HOUSE OF LORDS.]

MACKAY . . . . . APPELLANT;
DICK AND ANOTHER . . . . . RESPONDENTS.

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Contract—Condition Precedent—Implement of Condition prevented—Remedy.

If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied.

By a written contract *A.* agreed to buy of *B.* a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the *C.* railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "*C.*" cutting and tried at a face not a "properly opened-up" one, and breaking down, after a few days work, *A.* refused to give it any further trial or to pay the price of the machine:—

Held, affirming the decision of the Court below, that *B.* was entitled to a decree against *A.* for payment of the price of the machine.

Judicature Act of Scotland, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40—*Process—Appeal—Cases commenced in Sheriff's Court—Matters of Fact found by the Court of Session—Remit to Court below—Proof.*

The 40th section of the *Judicature Act* of *Scotland*, 1825, enacts, *inter alia*, that the judgment in cases commenced in the Sheriff's Court shall be subject to appeal to the House of Lords only so far as the same depends on, or is affected by, matters of law; but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor.

In appeals falling within the scope of this section, the House of Lords has no concern with the proof which has been led in the Sheriff's Court. When it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shewn by a reference to the record, and not to the proof. And if the questions are not raised by the record, no remit will be made.

APPEAL from a judgment of the First Division of the Court of Session, *Scotland*, pronounced in an action raised in the Sheriff's Court of *Lanarkshire*.

Previous to September, 1876, the Appellant, Mr. *John Mackay*,

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railway contractor, *Wishaw*, had entered into a large contract for the construction of a branch line near *Wishaw* for the *Caledonian Railway Company*. This contract required the excavation of an extensive cutting, called the *Wishaw Cutting*, one end of which was known as the *Carfin Cutting*, and the other as the *Garriongill Cutting*.

The Respondents, Messrs. *Dick & Stevenson*, engineers, had about the same time invented a steam excavator or navvy, which was capable of saving a good deal of manual labour. The parties entered into negotiations, and the question was whether the Appellant was bound in law to take delivery of one of these steam excavators and to pay the price, £1115, conformable to a written contract.

The contract between the parties is contained in the following letters:

To *John Mackay*, Esq. Sept. 21, 1876.

Dear Sir,—We beg to confirm the arrangement made between you and Mr. *Stevenson* yesterday in regard to supplying a patent steam excavating machine for your cutting at *Carfin*, which is as follows:—Machine to be as per accompanying specification, and capable of digging and filling into waggons at least 350 cub. yds. of the clay or other soft substances in said cutting—you supplying waggons as fast as they can be filled; and should it fall short of digging and filling this quantity after it is fairly tried on a properly opened-up face, you are not to be bound to keep the machine, but may return it at any time within two months. We, to uphold the machine for twelve months after its delivery, inasmuch as we will repair or replace, free of cost to you, all parts that may prove defective during that time, excepting the steam boilers and lifting ropes. The machine to be delivered, erected, and tested in the cutting before February next. Price to be £1115, one half payable when machine is delivered, one quarter in three months thereafter, and remainder within six months; or, if you prefer, the whole to be paid when the machine has been tested and proves capable of digging the work specified.

Dick & Stevenson.

To Messrs. *Dick & Stevenson*. 22 Sept. 1876.

Dear Sirs,—I have your favour of 21st instant, stating the terms upon which you will supply the above machine, and enclosing a general specification of same. The terms, which I now beg to corroborate, are:—

1st. That the machine will be capable of excavating and filling 350 cub. yds. into waggons in a day of ten hours, and that of the material in the *Carfin* cutting, which is now open for your inspection.

2nd. That the machine will be erected and tested in the said *Carfin* cutting before the month of February next.

3rd. That the machine will be so constructed as to fulfil all the requirements

necessary to admit of its travelling along any main line on its own wheels, along with, and as part of, any luggage train.

4th. That if the machine does not fulfil the terms of these stipulations, you shall remove the same at your own expense before the end of February next.

5th. That if I accept the machine after seeing its capabilities, you will maintain the same in all its parts, with the exception of the boilers and lifting ropes, for a period of twelve calendar months from the date of its commencing regular work.

6th. That I shall pay you for the said machine the sum of £1115 (eleven hundred and fifteen pounds sterling).

7th. That all the expenses connected with the bringing, erection, and trial of the machine are to be borne by you.

On these terms you may at once proceed with the construction of the machine—Yours, &c. *John Mackay.*

John Mackay. 26 Sept. 1876.

Dear Sir,—We were duly favoured with yours of 22nd inst. and agreeable to same are now proceeding with construction of the digging machine for *Carfin* cutting. . . . In erecting the machine for trial, it is to be understood that you are to lay and arrange the rails for the proper application of the machine, and also to supply waggons as fast as it can fill them. We neglected to say formerly that we will require the use of one of your jib cranes for a week or so in erecting the machine. The fifth clause of your letter would be more explicit were it put thus: "5th, That I will accept of the machine if it performs the stipulated work; and if so, you will maintain, &c., &c." No doubt this is what you intend, and on that understanding we have much pleasure in proceeding with the construction.—Yours, &c. *Dick & Stevenson.*

The material portions of the condescendence for the Respondents (Pursuers), and the answers thereto for the Appellant (Defender), are as follows:

(Cond. 5.) The cutting at *Carfin* was not in a condition to admit of the machine being erected and tested in it by or during the month of February, 1877, nor for a long time afterwards. Subsequently to that month the Defender (Appellant) agreed with the Pursuers (Respondents) to have it erected and experimented with in a cutting of the Defender's at *Garriongill*, pending the necessary preparation for the application of the machine at the *Carfin* cutting.

The machine was erected there. Denied that the cutting at *Carfin* was ready for the trial of the machine in February, 1877, as stated by the Defender. The cutting at *Carfin* was in the same state in February, 1877, as it was in July, the date at which the Defender says no further work could be done. Further explained that the Defender failed to have the cutting ready in February, 1877, and in consequence additional time was given Pursuers to complete the machine. The machine was in many respects of an entirely unprecedented construction and arrangement, and both parties were alike anxious to take advantage of the experiments offered by the Defender at *Garriongill*, particularly with a view of testing the strength of its parts.

(Ans. 5) The cutting at *Carfin* was ready for the trial of the machine in

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February, 1877, at which date the Pursuers were bound to have the machine ready for trial.

They failed to have the machine ready until July, 1877, at which date, owing to the state of the Defender's works, it was impossible to do more cutting at *Carfin* until a viaduct across the *Calder* should be completed. The parties accordingly agreed that the machine, instead of being tested at the *Carfin* cutting, should be tried at the *Garriongill* cutting.

(Cond. 6.) The conditions under which the machine had been worked at *Garriongill* did not admit of its capability to excavate and fill the stipulated quantity of material being tested. The material, whilst generally of a similar kind to those seen at *Carfin*, had a hard rib or layer of stony substance running through the cutting, which was not seen when it was proposed to send the machine to *Garriongill*, and the machine was made to tear through this rib. . . .

(Ans. 6.) Denied—The conditions of trial were more favourable to the machine at *Garriongill* than at *Carfin*. . . . The machine, however, while at *Garriongill* was constantly breaking down, and was proved to be entirely inadequate to its stipulated rate of work. It arrived at the cutting about the end of July, 1877, and between that date and the 26th of March, 1878, several unsuccessful efforts were made to get it started. On the 26th of March, after several alterations were made upon it, the machine was again started, and the trial continued continually down to the 22nd of May, 1878, under the most favourable conditions. During the whole period from July, 1877, to May, 1878, the total cutting performed by the machine was about 954 cubic yards.

The Defender expressed to the Pursuers his dissatisfaction with the machine, and his belief that it was quite incapable of performing the stipulated amount of cutting.

(Cond. 7.) The machine was then, by the Defender's instructions and concurrence, removed to and re-erected at *Carfin*, in terms of contract. This erection of the machine at *Carfin* was completed on or about the 9th of September, 1878. But here the conditions under which the machine was intended to be worked had been entirely changed from what existed or was contemplated at the time of making the contract, and did not admit of the application of the machine in the way intended, and so did not admit of its capability to excavate and fill the stipulated quantity of material being properly or fairly tried. In particular, the face of cutting to which it was to have been applied was entirely destroyed, so far as the proper application of the machine was concerned, by the introduction of men who carried forward by far the largest portion of the face of the cutting, so that there remained only a small portion, which could not and did not nearly furnish the machine with full work, or full scope to work. . . . The fair and proper working of the machine was not compatible jointly with manual excavators. Such a course of procedure was never contemplated, and, in fact, has never been attempted at any other work. The Pursuers repeatedly asked the Defender to afford them a fair opportunity of letting the machine be applied to its work properly, and, as was necessary, with a full face and without interruption, but he did not do so. Undert he terms agreed on, had these necessary conditions been furnished or observed by the Defender, the machine was capable of excavating and filling the stipulated quantity. Denied that it was at request of Pursuers that the machine was taken to *Carfin*. The taking it to *Carfin* was in terms of the

contract. Explained that the machine had never before been tried at *Carfin*. Denied that Defender was in a position to allow the machine to be tried on the 3rd of August, and considerable delay was occasioned on account of his not being even ready at the 9th of September, 1878, the date at which the machine was ready. Denied that the Defender made any conditions about the removal of the machine in the event of it breaking again. Admitted that the machine started work at *Carfin* on the 14th of September. Denied that it worked till the 9th of October. Explained that the machine only wrought a very inconsiderable number of hours at *Carfin* altogether, through the actings of the Defender. The machine was fit for the contemplated work.

(Ans. 7.) Admitted that on the request of the Pursuers the Defender permitted them to make a further trial of the machine at *Carfin*. A suitable face there was ready for trial on the 3rd of August, 1878. In consenting to a further trial at *Carfin*, the Defender informed the Pursuers that if the machine again broke down it would have to be removed, so as not to interfere with the progress of that cutting, which had to be proceeded with with the utmost despatch. The machine accordingly started work at *Carfin* on the 14th of September, 1878, and continued till the 9th of October, 1878, when the Pursuers' men ceased to work it, and it has not done anything since. During the above period, the total cutting done by the machine was about 126 cubic yards. For the whole period from July, 1877, to the 9th of October, 1878, the cutting done by the machine amounted in all to only 1080 cubic yards, or about three days' work. *Quoad ultra* denied.

(Cond. 8.) The Defender called on the Pursuers to remove the machine from *Carfin*, as he alleged it had not excavated and filled the stipulated quantity. The Pursuers refused to do so, and the machine is still at *Carfin*. The machine was delivered to Defender at *Carfin*, and is still in his possession there.

(Ans. 8.) Admitted.

The Appellant's pleas in law were as follows:

(1.) The Defender (Appellant) not being due the Pursuers (Respondents) the sum sued for, or any part thereof, is entitled to absolvitor. (2.) The machine having failed on trial, the Defender is not bound to accept. (3.) The sale of the machine being conditional on the trial, which has failed, the Defender is not liable in the price thereof. (4.) The Defender, not having committed any breach of contract, is not liable in damages. (5.) The action being unfounded in fact and law, the Defender is entitled to absolvitor, with expenses.

A proof was allowed by the Sheriff substitute. From that it appeared that there had been a mutual alteration of the contract, so far as that the machine should be furnished by February, 1877. The reason for this alteration the Appellant alleged was, the machine was not ready. When, however, the machine was ready, the Appellant, through the alteration of the railway company's plans, was not ready to give the required test at *Carfin*, and it was agreed that the machine should be sent to the *Garriongill* cutting;

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the Appellant said on the footing that it should be tested there instead of at the *Carfin* cutting. The Respondents, on the other hand, alleging that the machine was sent to *Garriongill* for the purpose of experiment, with a view to its being strengthened before it was tested at *Carfin*. The proof also contained the following facts. That in March, 1878, the machine commenced work at *Garriongill*, and worked on and off till the end of May. In that month the machine broke and was removed to the Respondents' workshop. During the three months it had excavated 477 waggons of 2½ cubic yards each.

On the 28th of May the Appellant wrote to the Respondents, requesting them before they took the machine to *Carfin*, to go and see the cutting there, and satisfy themselves as to whether they could excavate the amount of cutting with the machine that they guaranteed, and stating that that cutting would soon be commenced, and that he could not tolerate the stoppages to his work there, which had occurred at *Garriongill*. On the 2nd of August the Appellant wrote to the Respondents, "if you are again intending to try the digger, I trust you will do so at once." On the 9th of September, 1878, the Respondents wrote that the steam digger was ready for work at *Carfin*, and that as soon as the Appellant had rails laid for its application they would proceed to prove its capabilities to dig and fill 130 waggons of 2½ yards per day, as agreed to. On the 18th of September the machine commenced work at *Carfin*, on which day it excavated one waggon load; on the 19th it excavated thirteen waggons or 3½ cubic yards; on the 21st, three waggons, and then broke down. On this the Appellant wrote to the Respondents, that the machine had never even approached the guaranteed quantity to be excavated, and trusted they would remove it.

The Respondents replied, "The breakage was due to the experiments at *Garriongill*, which had no connection with the stipulated obligations at *Carfin*. At *Carfin* you are bound to give the machine a fair application to the material there, and after that to give us a month to test its capabilities at a fair face. Instead of that, you destroy the face by the introduction of men in place of the steam digger, and ask us to try it at a straggling end of a side piece of clay and boulders, in such a way as no machine of

the kind was ever tried before, and where the machine could not, by any possibility, do one-sixth of its work. You have explained to us the difficulty between you and the railway company as to time, &c., but whilst we have every disposition to accommodate you as much as possible, we must nevertheless insist that you allow the machine to get a full and fair trial in fair stuff, after which, if it fails in the quantity now stipulated, viz. 350 yards, we will take it away free of cost to you, but not till then."

Again, on the 10th of October, the Respondents wrote, that the machine had been again put to work at a face at which it had not proper scope. In acknowledging that letter, the Appellant, on the 15th of October, said: "You refer to the unreasonableness and illegality of my request to have the digger removed from *Carfin*. You must be well aware that these expressions are quite unjustifiable, as I expressed in my letter of the 28th ult., that the machine has never even approached the carrying out of your guarantee. It is now more than three months since the *Carfin* cutting was ready for the application of your machine, and in that time it has excavated about fifty waggons, or less than two cubic yards of earth per day. After looking at these figures, I think there is nothing unreasonable in again requesting you to remove the machine." The Respondents, *inter alia*, reply: "You say the machine has never even approached the carrying out of the guarantee. Did you or any reasonable man, ever expect such a thing so long as the machine was only applied to an eight or ten feet face, with one quarter compass instead of fifteen or twenty feet, one with a full compass?" And they demand again a proper trial; and that demand was repeated in a subsequent letter. The Appellant then repudiated any liability connected with the machine, the essential conditions on which alone he was willing to purchase not having been fulfilled.

The Respondents finding that the Appellant would not give them the opportunity of trying the machine at a fair face, raised this action in the Sheriff's Court, concluding for payment of the price of the machine, £1115. The Sheriff substitute pronounced an interlocutor, finding that the Appellant was bound to give the Respondents' steam-navvy a fair trial at *Carfin*, and that he had not done so, and therefore he was liable as concluded for. The

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Appellant having appealed, the Sheriff, on the 2nd of December, pronounced, *inter alia*, the following interlocutor:

. . . . Find that the machine was in due time erected at *Garriongill* cutting, and was there tested: Find that it did not satisfy the guarantee, but completely broke down notwithstanding the Pursuers had every opportunity afforded them during nearly two months of altering, amending, and adjusting, as they thought proper: Find that thereafter another opportunity was given them to prove that the machine satisfied the guarantee, and that they accordingly erected it at *Carfin*, where it was again tested: Find that this testing proved equally unsatisfactory with the former, and that, in consequence, it was definitely rejected by the Defender: Find, in point of law, that the Defender was entitled to do so, unless it could be established by the Pursuers, that the failure of the machine to satisfy the guarantee was attributable to circumstances for which the Defender was responsible, or for which at least they were not accountable: Find that the Pursuers have failed in discharging the *onus* thus laid upon them: Find, therefore, that the Pursuers having failed to satisfy the conditions of their contract, the defences fail to be sustained: Therefore recalls the judgment appealed against, and assoilzies the Defender from the conclusions of the action.

The Respondents thereupon appealed the cause to the First Division of the Court of Session, who pronounced the following interlocutor on the 21st of May, 1880.

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Recall the interlocutor of the Sheriff, of date the 2nd of December, 1879: (1.) Find that the Pursuers undertook to supply, and the Defender undertook to purchase and pay £1115 for, a steam-digging machine, in terms of the letters dated respectively the 21st and 22nd of September, 1876: (2.) Find that it was a condition of the said contract, that the Defender should not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of clay, or other soft substances, within a day of ten hours, in a certain railway cutting which the Defender was about to make, called the *Carfin* cutting, after it is fairly tried on a properly opened-up face: (3.) *Find that it was impossible that the machine should have the stipulated fair trial, unless the Defender provided a properly opened-up face at the said Carfin cutting*: (4.) *Find that the Defender failed to provide such properly opened-up face, notwithstanding repeated demands on the part of the Pursuers, and thus prevented the machine from being tested in the manner provided by the contract*: (5.) *Find that the Defender has failed to prove that the Pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine: Therefore repel the defences, and decern against the Defender to pay to the Pursuers the sum of* £1115, *with the interest prayed for, in terms of the petition*: (6.) *Find the Pursuers entitled to expenses in both Courts, but subject to deduction of the expense of the conjunct probation, which was incompetent, and ought not to have been admitted; and remit to the auditor to tax the account, or accounts, of said expenses, and to report* (1).

Against the findings 3, 4, 5, and 6, the Appellant appealed to

(1) Court Sess. Cas. 4th Series, vol. vii., p. 778; 17 Scot. Law Rep. 565.

this House. A petition was lodged by the Respondents against the competency of the appeal under the *Judicature Act* of *Scotland* (6 Geo. 4, c. 120), s. 40, being a case commenced in the Sheriff's Court, and the findings appealed against being findings of fact, and not of law. But at the Bar this petition was abandoned by the Respondents, on the ground that they could not support the allegation that the findings were findings of fact only, and did not involve any question of law.

Jan. 31 and Feb. 1, 3. *Sir F. Herschell, S.G.*, and *Mr. Johnstone*, contended for the Appellant, the essential obligation of the contract here was to supply a machine by February, 1877, capable of doing a certain amount of work within a certain time. That obligation could not be cut down by any stipulation as to a properly opened-up face. In February, the Respondents, it was clearly proved, were not ready with the machine. Accordingly the contract was altered as to time. In August, the Appellant was ready to give the test at *Carfin*, but not till the 14th of September is the machine furnished, and after four days it breaks down, having utterly failed to do anything like the stipulated quantity of work. Under these circumstances they submitted the Appellant was entitled, having regard to the failure at *Garriongill*, where it had an ample face and every necessity for a good trial, to say "you have not delivered to me within a reasonable time a machine capable of doing the amount of digging contracted for, and therefore I am not bound to give it another trial." It could not be the true construction of the contract as altered, that whenever the Respondents chose to furnish a machine, even though manifestly incapable, that the Appellant must go to the expense and inconvenience of giving it a trial at a properly opened-up face.

The evidence adduced in the Sheriff's Court amply established that a sufficient trial of the machine had been given to make it manifest to all that it did not conform to the contract. They submitted that issue was clearly raised by the Appellant's pleadings. But the interlocutor of the Court below contained no finding as to whether or not the machine conformed to contract, and as to other matters of fact raised by the Appellant, which if found in his favour would entitle him to absolvitor. On these

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grounds they asked that the case should be remitted to the Court below to pronounce findings on these matters of fact.

Their further argument is fully dealt with by the Law Peers in their opinions.

[They commented on—question of remit: *Fleeming* v. *Orr* (1); *Duncan* v. *Scott* (2).]

Mr. *E. E. Kay*, Q.C. (with him Mr. *Webster*, Q.C.), maintained for the Respondents, that it was one of the essential conditions of the contract, that the machine should be tested as capable of digging the material at the "*Carfin* cutting," that it was impossible to do that until the Appellant, in whose possession the cutting was, gave facilities for it, namely, waggons, rails, and a "properly opened-up face."

It could not be said that the legal conclusion drawn from the facts was wrong—there was a contract of sale and delivery which made acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer by his act prevents the possibility of the seller fulfilling the condition. Upon these facts the Court held as a matter of law that the condition must be held as implemented: See *Bell's* Prin., sect. 50; *Erskine*, 3, 3, 35; and *Hunter* v. *Earl of Hopetun* (3).

Secondly, the Appellant could not shew that a fact material to the legal result remained undisposed of. Instances of such omission might be found in *Fleeming* v. *Orr* (1); *Steel & Craig* v. *State Line Steamship Company* (4), but here no such fact was left unfound by the Court.

The Appellant did not contend that the machine was disconform to the specification, but he did contend that—notwithstanding there was no trial at *Carfin* on a properly opened-up face—that there ought to have been a finding that the machine was capable. The reason for the absence of such a finding was obvious. The test of what was a suitable machine was here expressly provided for by the terms of the contract. A sufficient machine under the contract was a machine which would do the stipulated amount of work at the stipulated trial at *Carfin*.

(1) 2 Macq. 14.
(2) Court of Sess. Cas. 4th Series, vol. iii. (H. of L.) at p. 73.
(3) 4 Macq. 972.
(4) 3 App. Cas. 72.

Also, as the Appellant had not raised on his pleadings the contention that he was relieved from complying with the stipulation of supplying a properly opened-up face and allowing a trial, by reason of there having been a demonstration of the incompetency of the machine by a trial which he had made, he was not able to have a remit to have that fact found in the findings. On these grounds he submitted that the findings of the Court below were conclusive against the Appellant.

[He also cited *Hotham* v. *East India Company* (1); *Planché* v. *Colburn and Another* (2).]

Sir F. Herschell, S.G., in reply.

The Lords having taken time to consider judgment, pronounced the following opinions:—

Mar. 7. LORD BLACKBURN:—

My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session, pronounced in reviewing the judgment of the Sheriff's Court of *Lanarkshire*, proceeding on proof taken on a record made up in the Sheriff's Court.

The Court of Session, in reviewing the judgment, had full power to find the facts on the proof, and to determine the law also. But the Legislature have, by the *Judicature Act* of *Scotland*, 6 Geo. 4, c. 120, s. 40, provided that—

When in causes commenced in any of the Courts of the Sheriffs, ... or other Courts, matters of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor.

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The old rules of pleading in force in *England* at that time were founded on the strictest logic, often carried to an extreme which, when the pleadings were not managed by very skilful

(1) 1 Durn. & East, 638–645. (2) 8 Bing. 14.

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hands, worked injustice, but always founded on a principle. And those which regulated special verdicts, to which the Legislature here refers, were no exception. They are very accurately and fully stated by Chief Baron *Comyns* in his Digest, title Pleader. The following, I think, bear on the question what the Legislature intended:

> The jury may find by their verdict all things given in evidence, if it be not contrary to the evidence or the admission of the parties. S. 4.
>
> They cannot find a matter contrary to the record, and if they do, the verdict is void as to that. S. 16.
>
> So the jury ought not to inquire of a thing which is agreed by the parties to the issue. S. 17.
>
> So the jury cannot find matter out of the issue, ... though the matter out of the issue destroy the Plaintiff's title. S. 18.

The reason of this last rule, which at first glance may seem harsh, is that the Defendant ought to have obtained in proper time leave to amend his pleadings, and not to rely on getting the jury to find on the evidence something never alleged by him, and which the Plaintiff was not called upon to be prepared to contest.

Whether we take these rules of English pleading as our guide, or the rules of sense and logic on which they are founded, it seems to me clear that the Court of Session need not in their interlocutor notice anything on which the parties are agreed. It may be convenient to do so in order to make the other findings clear, but it cannot be necessary. And they ought not to find anything, even if destructive of the Plaintiff's title, if it is not included in the issues joined; if it is necessary for the purposes of justice, they may, I suppose, allow an amendment, and remit the amended issue to the Court below for further proof, or dispose of it on the proof already given, as justice may require; but they ought not to find it in their interlocutor, on the record as it stands; and no complaint can be made in this House against them for not doing what they ought not to have done. This view of the statute of Geo. 4 renders it important to see what the record or issue is.

I have had the advantage of perusing the opinion of my noble and learned friend who is to follow me (Lord *Watson*), and as I agree entirely in all he says on this subject, I shall not repeat it (1).

(1) *Post*, p. 266.

The interlocutor finds that the contract was in terms of the two letters, 21st and 22nd September, 1876. It is a question of law what the effect of those letters was. I do not feel much doubt about that. The Pursuers were to supply a machine capable of digging and filling into waggons at least 350 cubic yards of clay in a day. It was to be brought to the Defender's cutting at *Carfin*, erected, and tested before February, 1877. Both agreed that the event of the testing was to be conclusive. If the machine did not answer the test, the Pursuers were to remove it before the end of February; if it did answer the test the Defender was to keep it and pay the agreed price.

I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances. In a very early case in *England*, in the Year Book of 9th Edward IV., Easter Term, 4 A., where the Defendant was sued on an obligation, the condition of which was that, if the great bell of *Mildenhall* should be brought, at the cost of the men of *Mildenhall*, to the house of the Defendant in *Norwich*, and there weighed and put in the fire in the presence of the men of *Mildenhall*, and the Defendant made a tenor of it to agree with the other bells of *Mildenhall*, the obligation should be void. *Choke*, then Chief Justice, and *Littleton*, and *Moile*, then Judges, held that a plea by the Defendant that the bell was not weighed nor put in the fire was bad, for the Defendant, being a brazier, it was his part to weigh it and put it in the fire; *Needham*, who was the fourth Judge, thought that the weighing of the bell required no particular skill, and might as well have been done by the men of *Mildenhall* or those they employed as by the Defendant. But he said that the putting it into the fire was the part of the artificer. And as I understand it, for the rest of the report is not very clear, a further point was mooted, and the Serjeants agreed that if the Defendant had put the bell in the fire, without seeing it weighed, he would have waived that which was but an incident, and been

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as much bound to fulfil that which was the substance of the contract, viz., to make a proper tenor, as if he had had it weighed. I mention this old case, decided in 1469, because it is on it that the different digests laying down the principle are all founded, and because I think it is obvious good sense and justice. Now, applying this principle to the present case; both agree that the machine shall be tested at *Carfin*, and therefore the Pursuers agreed that they would bring the machine to the *Carfin* cutting, and there erect it on the Defender's land, and there do their part in working it till there had been a fair test; and the Defender agreed that he would do his part, and even if there had been no express mention in the letters of a properly prepared face, the nature of the thing shews that he agreed to let the Pursuers have access to a part of the cutting, put by the Pursuers in such a condition that the machine could be fairly tested by working at it, and to assist in working it there until there had been a fair test. If, then, the averments on the record had been that, before the end of March, 1877, the machine had been brought to *Carfin* cutting and there delivered to the Defender, who required the Pursuers to remove it, and it was still in his possession there, I think there could be no doubt that the four first findings in the interlocutor put a proper construction on the contract, which, being a matter of law, your Lordships are entitled to inquire into, and that, if they find the facts truly, into which your Lordships have no right to inquire, it would follow in point of law that the Defender, having had the machine delivered to him, was by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the Pursuers to remove it. And by his own default he can now never be in a position to call upon the Pursuers to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it.

But the time when the machine was brought to *Carfin* and the Defender refused a further trial was long after February, 1877; it was in September and October, 1878. Unless both parties had agreed to enlarge the time, the original bargain would have come to an end by efflux of time in 1877.

But it is agreed on the record that the time was enlarged, and the bargain in all other respects still in force at least as late as July, 1877, and the Court of Session was not called upon to repeat in the interlocutor what was agreed on the record by both parties. There is a controversy on the record as to the terms on which the time was enlarged; and the question raised on that, which is a question of fact, is disposed of by the last finding in the interlocutor, into the accuracy of which, it being a finding of fact, your Lordships are not entitled to inquire.

It was, however, argued at your Lordships' bar that that was another ground of defence appearing on the evidence. I think I state fairly, and as favourably to the Pursuers as I can, the argument thus:—

It was said that the repeated failures of the machine between July, 1877, and October, 1878, though, not being on the stipulated place and in the stipulated manner, they were not the test, nevertheless, coupled with the other evidence, shewed that the machine was not such as could possibly in substance satisfy the contract. And that, therefore, the Defender was justified, or at least excused, in refusing to incur further expense and trouble in putting in force a test which could not possibly turn out favourably to the Pursuers, and that he was entitled to throw the machine back on the Pursuers' hands, not on account of the terms of the bargain, but on the general ground that a purchaser is entitled to return a thing which has been delivered to him in fulfilment of a contract, and to demand back the price if paid, or refuse payment if not yet paid, if the thing delivered is not in substance the thing contracted for. On the principle of the civil law expressed in the Digest, lib. 18, title 4: "*Si æs pro auro veneat non valet.*"

I do not think it desirable to express an opinion on a point which it is not necessary now to discuss. I will, therefore, only say that the view I took of the law on this point in 1867 is expressed in a judgment of the Queen's Bench, which I delivered in *Kennedy* v. *Panama Mail Company* (1). The other Judges of that Court adopted that exposition of the law, and I have not yet seen any reason to change my opinion. But I agree that if such a defence had been raised on the record in this case, the Court of

(1) Law Rep. 2 Q. B. 580, at p. 586.

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Session ought, in their interlocutor, to have found how much, if any, of the allegations were proved in fact. It is because, having carefully read the record, and having had the advantage of reading my noble and learned friend (Lord *Watson's*) observations on the record, I am clearly of opinion that no such defence was raised by the issue: that, I think, the Court of Session were not bound in their interlocutor to deal with it, even if it was made on the argument before them, which I think it was not.

I am, therefore, of opinion that the appeal should be dismissed, with costs.

LORD WATSON:—

My Lords, this appeal is brought against a judgment of the First Division of the Court of Session, by which the Appellant, *John Mackay*, railway contractor, *Wishaw*, has been decerned to make payment to the Respondents, who are a firm of engineers in *Airdrie*, of the sum of £1115 sterling, being the price of a patent steam-excavating machine, manufactured and supplied by them to the Appellant, as in implement of a written contract of sale entered into between the parties in the month of September, 1876.

The action was raised, and a proof was allowed and taken in the Sheriff Court; and it became the duty of the Court of Session, in reviewing the judgments of the sheriff's proceeding on that proof, to specify in their interlocutor, as required by sect. 40 of the *Scotch Judicature Act* (6 Geo. 4, c. 120), the several facts material to the case which they found to be established by the proof, and to express how far their judgment proceeded on the matter of fact so found, or on matter of law, and the several points of law which they meant to decide.

The specific findings upon which the decerniture against the Appellant is rested in the judgment under appeal, are as follows:— [Reads the interlocutor of the Court below (1).]

In so far as these findings consist of matters of fact, the review of this House is excluded by the clause of the *Judicature Act* already referred to (2).

The first two findings relate exclusively to the constitution and construction of the written contract upon which the action is laid,

(1) *Ante*, p. 258. (2) *Ante*, p. 261.

and are, therefore, matters of law. No appeal has been taken against these findings, and the Appellant must be held to admit that they are sound. But the Appellant is not thereby precluded from founding upon other conditions of the contract, or upon other views of the contract, so long as these do not involve the negation of what is affirmed by the findings in question.

In my opinion the third and fourth findings involve law as well as fact, in so far as they assume or imply that the Appellant was, by the conditions of the contract, bound to provide the "properly opened-up face" on which the machine was to be tried. So far as it is thereby found that, of the two contracting parties, the Appellant alone had it in his power to provide a properly opened-up face in the *Carfin* cutting, and that the Appellant did not provide such face, notwithstanding repeated demands on the part of the Respondents, nothing appears to me to be involved except matter of fact.

The fifth finding appears to me to be one of fact only.

The Appellant challenges the interlocutor under appeal upon two grounds. First of all, he maintains that, in respect there is no finding to the effect that the digging machine was conform to contract, the facts as found are insufficient to sustain a decree for the contract price. Alternatively he asserts that there were important issues of fact raised by him in the Court below, to which his proof was directed, but which the Court has not disposed of; and he contends that, assuming the facts already found to warrant the decree appealed against, he will, upon these issues being decided in his favour, be entitled to decree of *absolvitor*. And it was contended that the House ought, with a view to the final disposal of the case, to remit to the First Division of the Court to pronounce findings upon these matters of fact.

In order to a due understanding of the interlocutor under appeal, and of the Appellant's contention, it is necessary to refer to the closed record, which is the issue to which the proof of the parties was directed, and to which the findings of the Court apply.

The Respondents, in their condescendence (Articles 1 and 2), set forth the two letters of the 21st and 22nd of September, 1876, which have been held to constitute the contract. The first in date bears to be a confirmation by the Respondents of a verbal arrange-

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ment between one of their partners and the Appellant. [His Lordship read the first letter (1).] The letter of the 22nd of September, which is a confirmation of the preceding by the Appellant, recapitulates the terms of the agreement in language somewhat different, but having, for all practical purposes, the same meaning.

The parties are agreed upon the record as to the following facts:—(1) that the machine was not ready, and was not sent to *Carfin* cutting before or during February, 1877; (2) that it was afterwards sent to *Garriongill* cutting, and remained there from July, 1877, till May, 1878; and (3) that thereafter, certain repairs and alterations having been made upon it, the machine was sent to *Carfin* cutting about the middle of the month of September, 1878, where it still remained at the time the action was raised. They are also agreed that from July, 1877, to August, 1878, the Appellant was unable to proceed with his work at the *Carfin* cutting owing to a change of the plans of the railway company.

The parties join issue, however, upon the points following:—(1) the Appellant alleges, but the Respondents deny, that he was in a position to give a proper working face for testing the machine at *Carfin* cutting in February, 1877; (2) the Respondents state that the machine was sent to and kept at *Garriongill* cutting merely for the purpose of experiment, with a view to its being improved and strengthened before it was tested at *Carfin*, whereas the Appellant avers (Ans. to Cond. 5) that the parties "agreed that the machine instead of being tested at the *Carfin* cutting should be tried at the *Garriongill* cutting."

The Respondents (Cond. 7) aver in substance that the machine was sent to *Carfin* in order to its being subjected to the contract test,—that a proper working face was not provided by the Appellant whilst the machine was at work there,—that the machine could not in consequence be fairly tried, and that "the machine was fit for the contemplated work." The Appellant (Ans. Cond. 7) admits that, "on request of the Respondents," he "permitted them to make a further trial of the machine; a suitable face then was ready for trial on 3rd August, 1878. In consenting to a further trial at *Carfin*, the Defender informed the Pursuers that, if the

(1) *Ante*, p. 252.

machine again broke down it would have to be removed so as not to interfere with the progress of the cutting, which had to be proceeded with with the utmost dispatch." The Appellant meets the Respondents' allegations as to his failure to provide a suitable working face, and the fitness of the machine, with a direct negative, thereby asserting that he did provide a proper face whilst the machine was working at *Carfin*, and that the machine was not capable of performing the amount of work required by the conditions of the contract.

The 8th article of the condescendence for the Respondents is in these terms:—"The Defender (Appellant) called on the Pursuers (Respondents) to remove the machine from *Carfin*, as he alleged it had not excavated and filled the stipulated quantity. The Pursuers refused to do so, and the machine is still at *Carfin*. The machine was delivered to the Defender at *Carfin*, and is still in his possession there." The Appellant's answer is, "Admitted."

The foregoing answer appears to me necessarily to imply an admission on the part of the Appellant that the machine was delivered to him at *Carfin* cutting by the Respondents as an implement of the contract, and that he rejected it because of its incapacity to perform the amount of work stipulated in the contract. And that must be read in connection with his previous assertion that the "further trial" at *Carfin* was made on a proper face. Taking all his averments together, they appear to me to disclose no ground of defence to the action, except one, that the machine was disconform to contract, as was evidenced by the fact that it had been subjected to the contract test by working at a suitable face, and had failed to perform the stipulated amount of work. And it is a notable circumstance that, neither in the opinion of Lord *Shand*, who carefully states the respective contentions of the parties, nor in the judgment delivered by Lord *Mure*, is there to be found the least indication of any other controversy having been raised before the Court of Session by the Appellant.

This view of the Appellant's record is borne out by his pleas in law. The only pleas which indicate any substantive defence to the Respondents' claim for the contract price are these:—

"2. The machine having failed on trial, the Defender is not bound to accept it.

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"3. The sale of the machine having been conditional on the trial, which has failed, the Defender is not liable in the price thereof."

Such being the shape of the record or issue to which the findings of the Court of Session are applicable, I am of opinion that the findings in the interlocutor appealed against are in themselves sufficient to entitle the Respondents to decree for the price of the machine. The terms of the contract seems to me to imply very plainly that it was incumbent on the Appellant, and not upon the Respondents, to provide "a properly opened-up face" for the trial of the machine. Then the Court negatives the existence of the agreement, alleged by the Appellant, to substitute *Garriongill* for *Carfin* cutting as the place of trial; and find in substance that the Appellant failed to provide a proper face at *Carfin* cutting, "notwithstanding repeated demands" on the part of the Respondents. The Respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the Appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the Appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord *Shand* from *Bell's* Principles (§ 50) to the effect that, "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement," expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of *Scotland*, and I think it ought to be applied to the present case.

It was argued for the Appellant that the condition was only intended to operate in his favour, and that he might therefore dispense with it and defend himself upon the ground that the machine was, in point of fact, disconform to contract. But I cannot regard the stipulation in that light; it was so obviously for the interest of the manufacturers of this new patent machine

to have the question, whether it was or was not conform to contract, determined by reference to a simple and definite test, instead of being left to the uncertainty of speculative opinion, aggravated by the risk of litigation.

I now proceed to consider whether, before disposing of this case, any remit should be made to the Court below.

As I understood the Appellant's argument, he desired to have an opportunity of asking findings from the Court of Session to the effect that (1) the machine was disconform to contract, and (2) that the trials of the machine, though not to be regarded as equivalent to the test provided by the contract, made its disconformity to contract apparent to all concerned. Various other points were suggested for remit, but these appeared to me to be mere afterthoughts, and being unable to find any trace of their having been made grounds of defence in the record, I take no further notice of them. In the case lodged for the Appellant, his pleadings upon the facts, which include a great deal of unnecessary observation upon the proof led in the cause, are thus summed up (Case, p. 36): —"The only fact found by the interlocutor is that the Appellant failed to provide a properly opened-up face at the *Carfin* cutting. It is submitted that this finding does not, in point of law, warrant the finding that the Appellant is liable to pay the sum of £1115 and expenses. It is consistent with the facts found that the machine was not in fact according to contract, and that such trials as there had been afforded ample evidence of this. If this be so, it is submitted that the Appellant would not be liable to pay for the machine, and it is contended that the evidence establishes these facts, or, at all events, that the machine did not comply with the contract."

In the view which I have taken of the judgment under appeal, any general allegation by the Appellant, to the effect that the machine was not conform to contract, is irrelevant, because, according to that view, the machine must be held to have satisfied the contract test, which was not applied, owing to the default of the Appellant.

As to his other allegation, that "such trials as there had been" made it clear that the machine was disconform to contract, I doubt whether it is to be found on the record, and, even if it be, I have

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no doubt of its irrelevancy. No such statement would, in my opinion, afford a relevant answer to the case disclosed by the interlocutor under appeal, unless it amounted to this, that the machine was so disconform to the specification, or so palpably deficient in working power, that the Respondents were not in *bonâ fide* to tender it to the Appellant as in implement of the contract. I need only add that I have not heard it suggested in argument that any such case has been made by the Appellant, on record or elsewhere.

In appeals falling within the scope of the 40th section of the *Judicature Act*, 1825, I humbly conceive that this House has no concern with the proof which has been led in the Sheriff's Court. When it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shewn by a reference to the record, and not to the proof. It would, in my opinion, be productive of great inconvenience if the House were to make remits upon matters of fact which are not very plainly set forth upon record, as substantive grounds either of pursuit or of defence.

I am accordingly of opinion that the application for a remit which has been made by the Appellant's counsel, ought not to be entertained, and that the judgment under appeal must be affirmed, with costs, and the appeal dismissed.

LORD SELBORNE, L.C.:—

My Lords, having had an opportunity of reading in print the judgments which have now been delivered by my two noble and learned friends, and agreeing with them, I think it unnece ssary to add anything further.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, March 7th, 1881.

Agent for Appellant: *William Robertson.*
Agents for Respondents: *Simson & Wakeford.*

[HOUSE OF LORDS.]

LORD BLANTYRE AND ANOTHER . . . APPELLANTS;
THE CLYDE NAVIGATION TRUSTEES . RESPONDENTS.

H. L. (Sc.)
1881
March 7.

Navigable River—Right of the Clyde Trustees to dredge Foreshore, the Property of the Riparian Proprietor—Clyde Navigation Consolidation Act (21 & 22 *Vict. c.* 149), *ss.* 76, 84.

The *Clyde* Navigation Trustees, being empowered by sects. 76 and 84 of 21 & 22 Vict. c. 149, to dredge the bed of the River *Clyde* to a depth of seventeen feet, cannot be interdicted from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their Acts of Parliament.

Held so, affirming the decision of the Court below, but without prejudice to the question of their liability to subsequent compensation for damage.

APPEAL from the First Division of the Court of Session, *Scotland.*

On the 19th of June, 1879, Lord *Blantyre* and Master *Blantyre*, the Appellants, obtained a judgment of this House, affirming the interlocutors of the Court below, that the property in the ground forming the shores and banks of the River *Clyde*, between high and low water mark, *ex adverso* of their lands of *Erskine*, belonged in property to them; but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the trustees of the *Clyde* Navigation by their Acts of Parliament (1).

The question now is, whether, under the *Clyde Consolidation Act*, 1858, the *Clyde* Navigation Trustees, the Respondents, have power, without the Appellants' consent, to continue their dredging, widening, and deepening operations in the bed or channel of the navigable channel to the extent of seventeen feet at neap tides, within part of the area of the foreshore belonging to the Appellants. The question was raised by a note of suspension and interdict, by which the Appellants sought to have the Respondents prohibited from "taking, occupying, using, or removing, or other-

(1) 4 App. Cas. 770.

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wise interfering with any part of the soil, ground, &c., within the areas indicated by the number 131 upon the maps referred to in the Act of 3 & 4 Vict. c. 118." The areas in question form the shore and bank of the River *Clyde* between high and low-water mark, *ex adverso* of the Appellants' estate of *Erskine*.

The Acts passed from time to time for the improvement of the navigation of the river were the 32 Geo. 2, c. 62 (1758); 10 Geo. 3, c. 104 (1770); 49 Geo. 3, c. 74 (1809); 6 Geo. 4, c. 117 (1825); 3 & 4 Vict. c. 118 (1840); and the Act 21 & 22 Vict. c. 149 (1858), by which the trustees of the *Clyde* Navigation were constituted a body corporate. These Acts, so far as material, will be found fully set out in the opinions of the Law Peers.

The Appellants averred, *inter alia*, that under the Act 3 & 4 Vict. c. 118, the powers of the *Clyde* Trustees to take the land, or a part thereof, within the areas in question expired within eight years of the passing of that Act; and that upon the expiry of the eight years the power of "taking, acquiring, or occupying the said ground, or part thereof, without the consent of the Appellants first had and obtained, came to an end." That these powers had never been revived or restored, and the Respondents have not now and, since the expiry of the said eight years, they never have had, "any power to take, acquire, occupy, dig, dredge, or otherwise remove, or interfere with," the ground in question without the Appellants' consent.

That, notwithstanding the decree of this House, given above, the Respondents have recently and illegally, without authority, entered upon and begun to remove by dredging and selling, or carrying out to sea or to other lands than the Appellants', a portion of the ground in question without obtaining the consent of the Appellants thereto.

The Respondents averred, *inter alia*, that the Act 3 & 4 Vict. c. 118, of 1840, and all the prior *Clyde* Navigation Acts, were repealed by the *Clyde Navigation Consolidation Act* of 1858. By sect. 76 of that Act, the undertaking of the trustees was defined as consisting, *inter alia*, of "deepening, straightening, enlarging, widening, or confining, dredging, scouring, improving, and cleansing the river and harbour until a depth of at least seventeen feet at neap tides has been attained in every part thereof; the altering,

or directing, or making the channel of the river through any land, soil or ground, part of the present or former course or bed of the river." That the limits of the River *Clyde* are by sect. 75 defined to "include the whole channel or waterway of the said river forming the harbour, and as far down the said river as to a straight line drawn from" *Newark Castle* to *Cardross* burn. That by sect. 84 it was further provided, by provisions similar to those of the 45th section of the Act of 1840, regarding the operations opposite the Appellants' lands, that "it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof within the said limits (viz., from *Erskine Ferry* to *Frisky Hall*), "by machines worked by the power of steam, or other machinery, to the extent authorized by the recited Acts and by this Act" (viz., to the depth of seventeen feet at neap tides). They further averred none of the said *Clyde* Navigation statutes give the Appellants any right to interfere with the dredging operations carried on by the Respondents in the channel of the river for the improvement of the navigation, nor to claim compensation in respect thereto.

The Respondents admitted that they did not take or acquire under their compulsory powers of purchase the ground in question. They explained, "that they were not bound under the Acts to do so. They had, since 1840 and down to the present time, been in the habit of carrying on dredging operations upon the said area, and their right to do so has never till now been disputed by the Appellants, nor have they claimed compensation therefor." "The site of these operations are in the estuary of the *Clyde*, and the portion of the *solum* which is to be removed for the purpose of widening the channel is far below high-water mark. Before the earlier operations of the Respondents were commenced, the whole of that space was permanently under water, and the effect of those operations has been to confine the deep channel within its present limits. At present the space intended to be removed is under water for about eighteen out of the twenty-four hours, and is part of the water-way of the river." They denied that they required the consent of the Appellants in order to carry on the said dredging operations, or that the said limit of eight years applies to their operations on the ground in question.

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The Appellants' pleas in law were:

1. The ground in question being the property of the complainers, and the *Clyde* Trustees having no right to take or acquire the same, or to dredge thereupon, without the complainers' (Appellants') consent, the complainers are entitled to interdict as craved. 2. The operations complained of being illegal, unwarrantable, and unauthorized, the complainers are entitled to have the interdict made perpetual.

The pleas in law for the Respondents were as follows:

1. The complainers' averments are not relevant or sufficient to support the prayer of the note of suspension. 2. The complainers are barred by their own actings from insisting on this note of suspension. 3. The complainers' rights to the foreshore in question are subject to the rights of navigation and other rights which the public have over the same, and to the rights conferred on the Respondents by their statutes, and also to the rights granted by the royal charters to the magistrates of *Glasgow*. 4. The Respondents are entitled at Common Law, and *separatim* under the aforesaid statutes and royal charters, to deepen the channel of the river by dredging the area of foreshore marked 131 to the depth of seventeen feet. 5. The Respondents' statutory powers (now expired) of taking and acquiring land compulsorily, had and have no application to the dredging operations carried on by them on the said area or foreshore. 6. The Respondents are not bound to obtain the complainers' consent to the said dredging operations, nor to pay compensation in respect thereto.

On the 21st of January, 1880, the Lord Ordinary (1) repelled the reasons for suspension, and recalled the interdict formerly granted. The Appellants having reclaimed to the First Division, their Lordships, on the 5th of March, 1880, adhered to the Lord Ordinary's interlocutor, and refused the reclaiming note (2).

On appeal,

Feb. 15, 17, 18. Sir *F. Herschell*, S.G., and *R. T. Reid* (of the Scotch Bar), were heard for the Appellants.

Mr. *Benjamin*, Q.C., and Mr. *Asher* (of the Scotch Bar) were heard for the Respondents.

The Law Peers having considered judgment, delivered the following opinions:—

March 7. LORD SELBORNE, L.C.:—

My Lords, the question in this case arises upon the construction of an Act "To consolidate and amend the Acts relating to the

(1) Lord *Young*.

(2) Court Sess. Cas. 4th Series, vol. vii. p. 659; 17 Scot. Law Rep. 476.

River *Clyde* and Harbour of *Glasgow*," passed in 1858, by which a series of earlier statutes, as to the same river and harbour, was repealed. The original Act, passed in 1758, as explained and amended in 1770, empowered the predecessors in title of the Respondents to "cleanse, scour, deepen, and enlarge, or straighten and confine the said river and channel thereof, or any part or parts of the same" (within certain defined limits), "and to dig and cut the soil, ground, or banks of the said river, and soil, sand, and gravel in the bed thereof." These operations were to be carried on until the river and harbour should, throughout its course within the prescribed limits, have attained a minimum depth, which was from time to time increased, till in 1840 it was fixed at seventeen feet at neap tides. No consent of any proprietor, who might be entitled to any estate or interest in any part of the bed or foreshore of the river which might be affected by them, was required for the exercise of these powers. In 1825 the same authorities were enabled (in enlargement of their former powers, and still without requiring any consent), to

> dredge, cleanse, and scour by machinery worked by the power of steam, or otherwise, the said river and bed or channel thereof; to remove all sand banks or shoals which might obstruct the navigation, and to erect and construct . . . . such new works as should seem to them proper and expedient for directing the stream of the river, for removing obstructions to the course of the tide, for bringing up a greater quantity of tide water, and for making, continuing, maintaining, and securing the navigable channel of the said river at least of (the prescribed) depth, and of as great width as might be found expedient for enabling vessels resorting to the harbour of *Glasgow* to pass each other with safety and facility.

From the beginning power was given to make locks, dams, weirs, jetties, walls, &c. The earliest Act which authorized the acquisition by purchase of lands, for permanent works connected with the navigation, was that of 1825. A wet dock, wharf, and other specified works, according to maps and plans, were authorized in 1840, to which others were added in 1857. For these, compulsory powers to take land were, in 1840, for the first time given. All the Acts, from 1758 downwards, provided for compensation to the owners of lands, &c., for any damage to be done to them by the construction of authorized works, and, generally, by "any work, matter, or thing to be done by authority or in pursuance of" the Acts.

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The Appellant, Lord *Blantyre*, is the owner of the estate of *Erskine*, including the foreshore of the river *Clyde*, for a considerable distance on the south side of the river, within the prescribed limits. Part of the foreshore belonging to him was included in the plans and sections referred to in the Acts of 1840 and 1857, or one of them, which shewed a retaining wall, the construction of which on that foreshore was authorized, but which has never (as I understand) been built. In the Acts of 1825 and 1840, special clauses for the protection of the *Erskine* estate were inserted, whereby, as to certain works by which that estate might have been affected, the powers conferred by those Acts were made conditional upon the consent of the proprietor. Both those clauses, however, were qualified by provisoes authorizing the trustees of the navigation (without any consent) "to deepen the river by dredging the bed or channel thereof," (within the protected limits) "by machines worked by the power of steam, or other machinery."

This (shortly stated) having been the effect of the legislation before 1858, the 3rd section of the Act of that year repealed all the prior Acts, "subject to" its own provisions. And the present question is whether, under this Act of 1858, the Respondents, the trustees of the navigation, have power, without Lord *Blantyre's* consent, to continue their dredging, deepening, and widening operations in the bed or channel of the river adjoining the *Erskine* estate, so as to increase the depth of the navigable channel to the extent of seventeen feet at neap tides, within part of the area of the foreshore belonging to Lord *Blantyre*; causing the water of the river to flow and remain, at all times of the tide, over parts of the bed or channel which were previously left dry, during some part of every twenty-four hours, at all ordinary tides.

The preamble of the Act of 1858 recites, that

> the great and continued increase of the shipping and trade of *Glasgow*, consequent on the improvement of the river and harbour, rendered it necessary that, *in conformity with the provisions of the recited Acts*, the navigation should be further enlarged and improved, and additional accommodation afforded in the harbour;

for which purposes increased rates were to be imposed on vessels and goods; and that

it was also expedient that the said several Acts should be repealed, *and their provisions consolidated and amended.*

The only sections of this Act to which I think it necessary now to refer, are the 73rd, the 76th, and the 84th. Unless the powers in question are re-enacted by those sections in the Respondents' favour, there is nothing else to confer them.

The 73rd section transfers to and vests in the Respondents (*inter alia*) "*the whole undertaking*" of the former trustees.

The 76th section defines "the undertaking" so transferred; and says that (subject to the provisions of the Act, and to the effect of any previous agreements or conveyances), it

"shall, in terms of the recited Acts, consist of the deepening, straightening, enlarging, widening or confining, dredging, scouring, improving, and cleansing the river and harbour, until a depth of at least seventeen feet at neap tides has been attained in every part thereof; the altering, directing, or making the channel of the river through any land, soil, or ground, part of the present or former course or bed of the river;"

and other things, which it is not necessary to enumerate in detail, but which include the erection of jetties, banks, walls, &c., and the construction and completion of the wet docks, tidal basin, and other works, shewn and described in the plans and sections referred to in the repealed Acts of 1840 and 1857, and thereby authorized to be made and maintained.

This is, undoubtedly, a singular and very inartificial manner of re-enacting, by way of consolidation, the powers contained in and conferred by the repealed Acts; but the preamble shews that it was the intention of the Legislature (subject to such amendments as were thought requisite) to do so, and it is not otherwise done. The words, "in terms of the recited Acts," cannot, indeed, amount to a re-enactment of all that had been repealed; but they do refer to, and by reference incorporate, so much of the repealed Acts as, when examined, is found to describe and define the powers and authorities meant to be transferred to and vested in the Respondents, as part of the undertaking. Some of these, and particularly the powers of "deepening, straightening, enlarging, widening, confining, dredging, scouring, improving, and cleansing the river," until the prescribed depth should have been attained in every part thereof, and the "altering, directing, or making the channel of the river through any land, soil, or ground," being part of its

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"bed or course," were, by the earlier Acts, conferred upon the predecessors of the Respondents, without contemplating or providing for the purchase or taking of any land; while others (those relating, *e.g.*, to the construction of docks, &c.) were conferred by later Acts, in the manner usual when lands must be acquired, either compulsorily or by agreement. The effect of these words of reference is (in my opinion) that both these classes of powers were continued to the Respondents, as if they had been given anew "in terms" of the repealed Acts. It follows, that the Respondents have now the former class of powers (being those of which alone the exercise is in question on this appeal) as the former trustees had them, *i.e.*, without limit of time, and without need of any purchase or taking of land as the condition of their exercise.

I am confirmed in this conclusion by the 84th section, which repeats, in the very terms of the corresponding clause in the Act of 1840, the special protection given by the 45th section of that Act to the Appellants' *Erskine* estate, and also to certain lands of other proprietors; ending, however, with the following qualification of that protection, by way of proviso:

"Provided, that it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof, within the said limits, by machines worked by the power of steam, or other machinery, *to the extent authorized by the said recited Acts* and this Act."

I do not see how the present appeal could be determined in the Appellants' favour without contradicting this proviso.

It was contended (as I understood the argument) for the Appellant, that all these powers were, indeed, granted by the Act of 1858 to the Respondents, but only in this way, that the Respondents must (if they could) acquire the land, which (by reason of their dredging, deepening, or widening operations) would cease to be foreshore, from the Appellant and any other owners of the foreshore, under the provisions for taking land by agreement contained in the *Lands Clauses Act*, incorporated with the Act of 1858 by sect. 4. Such a power, however, would be dependent entirely on the consents of the Appellant and the other foreshore proprietors, which they could not be compelled to give. The proviso at the end of the 84th section must, from the antecedent

context, necessarily mean that these particular operations might be carried on, in the bed or channel of the river adjoining the *Erskine* estate, without the Appellant's consent. The compulsory powers of the *Lands Clauses Act* were not incorporated with the Act of 1858, except for certain special purposes not extending to those operations; and (even as to those special purposes) they were incorporated only for less than two years. It was not contemplated by any of the repealed Acts (as I read them), that the former trustees should "purchase" or "take" any land in the channel or bed of the river, which, by reason only of their dredging, deepening, or widening operations, might be permanently covered with water, having before formed part of the foreshore at low tide; much less, that they should have no power to carry on such operations at all, unless they did so. What was not necessary, for this purpose, under the former Acts, is not (in my opinion) necessary under the Act of 1858. It was insisted that, according to this view, the Appellant would practically be deprived of part of his foreshore without compensation, and that this could not have been the intention of the Legislature. To that argument I am unable to accede. If the former Acts did not cover, by the provisions as to compensation contained in them, this particular kind of damage, there would be no reason to expect that the Act of 1858 would do so. If they did cover and provide for it, it may well be that the effect of the 76th section of the Act of 1858 is not to make those powers absolute and unconditional which were previously conditional upon compensation being made for damage done, but that the reference to the "terms of the recited Acts" may be sufficient to preserve the condition as well as the power. There may also, possibly, be questions as to the effect of the compensation clauses in the *Harbours Clauses Act* and the *Commissioners Clauses Act* of 1857, both which are incorporated, generally, with the *Clyde Harbour Act* of 1858.

All these questions are (as the Lord Ordinary stated) left unprejudiced by the interlocutors now under appeal. It is not necessary, nor do I think it would be convenient for your Lordships now to determine them; because, however they might be decided, my conclusion on the particular question raised by the present appeal would still be the same. The interlocutors appealed

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from [are, in ⁻my opinion right, and I therefore move your Lordships that the appeal be dismissed, with costs.

EARL CAIRNS:—

My Lords, I am of opinion that the Act of 1858, although it in form professed to repeal the catena of previous Acts which had been passed during a century for improving the navigation of the *Clyde*, yet preserved to the Respondents by its re-enacting words the right to improve the navigation by doing the acts now complained of, without any obligation of obtaining the consent or purchasing the land of the Appellant beforehand, whatever liability to subsequent compensation for damage it may have made or left them subject to. I have arrived at this conclusion with perhaps more difficulty than seems to have been felt by the Court below; but my grounds are, first, because the words of the enactment of 1858 referred to by the Lord Chancellor, though inartificial and inappropriate, are yet sufficient, looking to the whole scope and history of the legislation, to carry into the new Act the "terms," by which I understand from the context the "powers," of the old Acts; secondly, because the contention of the Appellant would absolutely paralyze, and possibly destroy, the great public work which it was the object of Parliament to effect, and is not to be adopted unless no other construction is possible; and thirdly, because the insertion of the 84th section of the Act of 1858 for the protection of the *Erskine* estate of the Appellant, would, in my opinion, be absolutely meaningless if the Appellant was meant to be left in a position in which he could refuse his consent to allow any works whatever to be executed by the Respondents on or over his *solum*. I agree that the appeal should be dismissed with costs.

LORD PENZANCE:—

My Lords, the Respondents in the present appeal are the trustees of the *Clyde Navigation*, and, as the public body invested by statute with the duty of maintaining and improving the navigation of that important river, have begun to remove by dredging, and carrying away in barges or punts, a portion of the

soil on lands which it is admitted belong to the Appellants, but which are situated below high-water mark at ordinary times, and which therefore form part of the river channel.

Commencing a period of upwards of a hundred years since, statutes have been passed for the improvement of the navigation of the River *Clyde*. I do not think it will be necessary, in the determination of this case, for your Lordships to scrutinize very narrowly the precise provisions of these statutes, with the exception perhaps of the Act of 1840. They have all been repealed by the last Act of 1858, under which the present trustees were constituted, and it is the proper construction of that Act which must determine your Lordships' decision in the present case. But, speaking generally, it must be observed that, by these statutes, powers have been conferred from time to time on the trustees of the navigation to deepen and (within the limits of high-water mark) to widen, to an extent sufficient to accommodate the shipping, the navigable channel of the river by dredging and removing the soil, without any previous consent of the persons to whom the land upon which the dredging operations might be performed belonged.

Provisions no doubt were introduced, from time to time, for compensation to the landowners, but their consent was in no instance rendered necessary.

And this could hardly have been otherwise. Where the growing trade of such a port as *Glasgow* was in question, it could hardly have been expected that the entire project of improving the navigation should have been left at the mercy of any person who happened to possess any portion of the soil under water at high tide, and who, by refusing to have any portion of that soil removed, might have practically rendered the deepening of the navigable channel impossible.

The Legislature is in the perfectly well known habit of dealing with such a matter either by way of pecuniary compensation, or, if the land itself is required to be taken and appropriated, by compulsory purchase.

The land here in question being land which is covered with water at high tide, and thus forms part of the channel of the river, is land not available for the ordinary uses of land; and it may well be that the Legislature thought that the injury done to

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it by removing part of the surface was one which might properly be met by a system of compensation.

Be that as it may, the fact is, that from 1758 down to the year 1840, although every Act provided for works in the way of deepening and improving the channel of the river within high-water mark, and provided compensation in case of injury, no provision is to be found for requiring the consent of the landowners, and none for the compulsory purchase of their lands.

In 1840, no doubt, a larger scheme was set on foot, and received the sanction of Parliament. Two lines were drawn, enclosing a space wider in several places than the existing channel of the river, and consequently including at some points not only land lying within high-water mark, but land above and outside it; and powers were taken by the statute of that year to extend the existing channel of the river to the limits included within these two lines. This involved the absorption, in some places, into the water channel, or the works connected therewith, of what had always been dry land, and the permanent occupation in other places of land which did not belong to the trustees. The trustees were, therefore, invested for a limited time with power to "take, occupy, and use" any of the land falling within the lines marked out as before mentioned, and specified in the schedule to the Act, "indemnification being always made to the owners, &c., of such land, &c." But the statute of that year was by no means, in its enactments, confined to the carrying out of this new and more extensive scheme, with the powers of compulsory purchase necessary for that purpose; for we find it enacted by sect. 11 that the trustees "are hereby empowered *not only* to execute and continue the several works authorized by the recited Acts" (and all the previous Acts are recited), but *also* to execute the "additional works" authorized by the Act.

The effect of this statute, therefore, was in the first place to keep alive, and give a fresh authority to, the preceding Acts for deepening and widening the channel of the river, and, in the second, to authorize the execution of a new scheme for greatly extending the channel of the river, and constructing wet docks and other works in connection therewith.

I have called attention to the exact effect of this statute,

because the main contention of the Appellants is rested upon its provisions, inasmuch as the land now in question lies within the two lines drawn as the intended limits of the new river channel, and is found among those lands which are set down in the schedule of the Act as lands which the trustees had power to purchase.

In this condition of previous legislation (passing by one or two Acts which are not material), the Act now in force, the 21 & 22 Vict. c. 149, was passed in 1858.

It was an Act

to consolidate and amend the Acts relating to the River *Clyde* and harbour of *Glasgow*.

The preamble recites the former Acts, and then goes on to recite the

great and continued increase of the shipping and trade of *Glasgow*,

and that it is

necessary that, in conformity with the provisions of the recited Acts, the navigation should be further enlarged and improved, and additional accommodation afforded in the harbour,

and that it is expedient that

the former Acts should be repealed, and their provisions consolidated and amended.

There can be no doubt, therefore, that the Legislature intended that the powers of the trustees should be rather enlarged than curtailed, or withdrawn, which is a consideration not without importance when your Lordships come to construe the enacting clauses by which a preamble of this character was succeeded.

The clause mainly in question is sect. 76. It is somewhat oddly framed. The mode adopted for conferring on the trustees the powers necessary for the execution of the work confided to them is by declaring that "their undertaking shall consist of," &c., &c., and then follows an enumeration of their different powers, functions, and duties.

Now, it is important for the purposes of the present case to observe, that quite independently of any reference to the former Acts, there is to be found among the matters of which the undertaking of the trustees is declared to consist

the deepening, straightening, enlarging, widening, or confining, *dredging*, *scouring*

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improving, and *cleansing* the river and harbour until a depth of at least seventeen feet at neap tides has been attained in every part thereof,

also

the *digging* or cutting the *soil* or banks of the river *or bed thereof*, and laying the same on the most convenient banks of the river,

and these

works, or such and so many of them as to them shall from time to time seem expedient, they are to carry on and complete.

In all this there is nothing said of the previous consent of the persons who may be the owners of the soil in those parts of the river in which the "dredging, &c., digging or cutting of the soil" may take place . . . . nor would the necessity for such a previous consent be consistent with any practical measure for carrying out the useful objects to which I have already alluded as declared in the preamble to be the objects for which the legislation was devised and intended.

Stopping therefore at this point, and reading this Act without reference to the question how far the former Acts, although repealed, were intended to be kept alive by virtual re-enactment, I fail to see that the trustees have exceeded the powers conferred on them.

But I am further of opinion that, according to the true reading of this Act, it was intended by the introduction into sect. 76 of the words "in terms of the recited Acts," to declare that the powers and duties, of which the "undertaking" was said to "consist," should be exercised and performed substantially in the manner, and subject to the restrictions, by the former Acts provided, and I adopt the expression of Lord *Hatherley* in the case cited at the Bar, that the former Acts were intended to be "summarized" compendiously by the section in question.

The Appellants indeed rely upon this view, and they use it in this way. They say the provisions of the Act of 1840 were thus kept alive, and then they say that under that Act the trustees had no power to touch their land unless they exercised the right which they possessed of purchasing the land outright. But I have already pointed out that under that Act the trustees had power, in conformity with the provisions of the former Acts, to dredge, &c., within the channel of the river, that is, within high-water mark, without purchasing the land.

In whichever way therefore the statute of 1858 is regarded, whether as an isolated enactment unconnected with the previous Acts, or as an enactment intended to summarize and consolidate the previous Acts, the acts of the trustees are, I think, justified without the Appellants' consent, and the judgment appealed from ought, I think, to be affirmed.

LORD BLACKBURN:—

My Lords, the River *Clyde* flows into the upper or eastern end of the Firth of *Clyde*, which is an arm of the sea. *Glasgow* is situated on that river, just where the tide ceases to affect it. Lord *Blantyre* and his predecessors are owners of the barony of *Erskine* on both sides of the *Clyde*. *Erskine* lies below or to the west of the River *Cart*, which flows into the *Clyde*, and is both above and below *Dumbuck*, which is about the place where, in popular language, the river may be said to end and the firth to begin. *Dumbarton* is lower down, and *Port Glasgow* and *Newark Castle* on the south, and *Cardross* on the north side of the Firth of *Clyde*, are some miles further west, and there the firth is so broad that, in popular language, the river has ended and it is part of the sea. All these places are mentioned in the different Acts relating to the River *Clyde* and the harbour of *Glasgow*, which were, by the 21 & 22 Vict. c. 149 (2nd of August, 1858), meant to be repealed, and their provisions consolidated and amended in one Act, but that Act has been drawn in so unskilful a way that I am afraid, in order to understand it, it is necessary to construe the previous Acts just as if they were still in force. In this river and the firth, into which it flows, like all places where the tide ebbs and flows, there is a line marking the boundary of that land which at ordinary low tide is covered with water, and an inner line marking the boundary of that land which at ordinary high tides is covered with water, but not at low water. Lord *Blantyre* was, by a declarator affirmed by this House in *Lord Advocate and the Trustees of the Clyde Navigation* v. *Lord Blantyre* (1), found to be proprietor of the foreshore or portion of land between high-water mark and low-water mark, *ex adverso* of his lands of *Erskine*, but subject always to any rights

(1) 4 App. Cas. 770.

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of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the trustees of the *Clyde* navigation by their Acts of Parliament.

Lord *Blantyre* applied for an interdict to prohibit the *Clyde* Trustees from interfering in any way with the part of the foreshore, No. 131 in the book of reference referred to in 3 & 4 Vict. c. 118. The question is one of relevancy.

It appears by the statements of fact and answers that this is a part of the foreshore included in the declarator; it is several miles above or to the east of *Port Glasgow*, and is above both *Dumbarton* and *Dumbuck*, and below or to the west of the *Cart*, and is in its present state under water for about eighteen hours out of the twenty-four. The *Clyde* Trustees have begun to remove part of this plot, and avow their intention to remove more of it, until they have widened the navigable channel there to the width which, in their opinion, is expedient for enabling vessels resorting to the harbour of *Glasgow* to pass each other with safety and facility, and until the navigable channel so widened is deepened to seventeen feet. They say that they have the legal power to do this without asking Lord *Blantyre's* consent. No question as to whether Lord *Blantyre* is entitled to compensation is raised; that will come hereafter. But one argument of the counsel for the Appellant was that, on the true construction of the Acts, the trustees could not under the Acts do what they proposed to do, unless they first bought and paid for the spot, and that their power to buy without the proprietor's consent expired long ago. If this was well founded, it was an answer, but I think, for the reasons I shall presently give, it was not well founded. The Lord President contented himself with saying that what was going on in the way of operations for deepening the river was quite within the powers reserved or conferred by sect. 76 of the Act of 1858. Lord *Shand* observed that the operations entirely consist in the removal of soil by dredging, and for that purpose the trustees do not propose to take property permanently or to occupy property permanently; and he says that if there were any doubts as to the effect of sect. 76, it would be entirely removed by sect. 84. I have come, on looking at the matter carefully, to be entirely of the same opinion, but the ingenious arguments at your Lordships'

bar convinced me that the drafting of the Act of 1858 was so very inartificial as to render it proper to inquire whether sect. 76 as framed really bore that meaning.

The first Act of 1758, 32 Geo. 3, may, I think, be passed by. It was never acted upon. By the next Act of 1770, 10 Geo. 3, s. 3, the magistrates of *Glasgow* are empowered

> From time to time, and at all times hereafter, to make and keep the said River *Clyde* navigable from the lower end of *Dumbuck Ford* to the bridge of *Glasgow* aforesaid, so as there may be at least seven feet water at neap tides in every part of the said river within the bounds aforesaid, for ships, vessels, barges, and lighters to come and go to and from the said city of *Glasgow*, and for that end to alter, direct and make, or cause to be altered, directed and made, the channel of the said river, through any land, soil, or ground (part of the present bed of the said river) between the lower end of *Dumbuck Ford* and the bridge of *Glasgow* aforesaid, and to make, set up, and erect on both sides of the said river such and so many jetties, banks, walls, sluices, works, and fences for making, securing, continuing, and maintaining the channel of the said river within proper bounds for the use of the said navigation as to the said magistrates and council, and their successors in office, shall seem proper and convenient, and for that purpose to cleanse, scour, deepen, and enlarge, or straighten or confine, the said river and channel thereof, or any part or parts of the same, within the limits aforesaid, and to dig or cut the soil, ground, or banks of the said river, and soil, sand, and gravel in the bed thereof, and to lay the same upon the most convenient banks of the said river, and to plant the banks on each side of the said river within the bounds aforesaid with willows or other shrubs for the safety or preservation of the said banks, and for preventing the same from being hurt or carried away by the said river, satisfaction being always made to the owners of the ground that shall be thereby damaged, as in manner hereinafter directed.

The Act of 1809, 49 Geo. 3, after reciting that in consequence of the powers vested in the magistrates and council of the said city by the said recited Acts, the navigation of the said river has been greatly improved, and the channel deepened and cleansed, and the trade and shipping of the said river and city have of late greatly increased and are increasing, and the ships and vessels belonging and trading to and from the port of *Glasgow* are now become more valuable and of larger dimensions, and by continuing the works now carrying on and adopting others the said river may still be further improved, and the channel deepened and enlarged; and that it would be a great advantage to the merchants, traders, and inhabitants of the said city and of the places adjacent, to the owners and masters of vessels navigating the said river, and to the country at large, if the said river was further improved, and the

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bed and channel thereof further deepened and enlarged, enacts that the trustees, for the purposes of the before-recited Acts, shall be empowered, not only to continue the works authorized by the said Acts, but also to carry on such new and additional works as they shall think proper, till such time as the said river is at least nine feet deep at neap tide in every part thereof, between the bridge of *Glasgow* and the castle of *Dumbarton*, for ships and vessels to navigate to and from the said city.

By the Act of 1825 the *Clyde* Trustees are empowered,

Not only to continue the works authorized by the said Acts in the manner and way therein described, but also to carry on and execute such new and additional works as they shall think proper, within the high-water mark at ordinary tides, between the bridge of *Glasgow* nearest the *Broomielaw* and a straight line drawn from the harbour of *Port Glasgow* on the south to the village of *Cardross* on the north, till such time as the said river is at least thirteen feet deep at neap tides in every part thereof, and particularly to dredge, cleanse, and scour by machines worked by the power of steam or otherwise the said river and bed or channel thereof, to remove all sand-banks or shoals which obstruct the navigation, and to erect and construct jetties, . . . and all other works authorized by the said Acts, and such other new works as shall seem to them proper and expedient for directing the stream of the river, for removing obstructions to the course of the tide, for bringing up a greater quantity of tide water, and for making, continuing, maintaining, and securing the navigable channel of the said river at least of the depth aforesaid, and of as great width as may be found expedient for enabling vessels resorting to the harbour of *Glasgow* to pass each other with safety and facility, reserving always to the proprietors of lands adjacent to the river all rights to soil acquired from the said river, or other rights competent to them at common law, satisfaction being always made to the owners and occupiers of the lands, fishings, harbours, roadsteads, tenements, or other heritages adjacent to or in the river or frith of *Clyde* which may be injured or damaged by or in consequence of the said operations, as in manner hereinafter directed.

Provided also, and be it enacted, that it shall not be lawful for the said trustees, under the powers conferred by the present Act, to make or construct any jetties or other works on the south side of the said river, along the estate and land of *Erskine* (without the consent in writing of the proprietor for the time being of the said estate in that behalf first had and obtained), between the ferry of *Erskine* and a point opposite *Frisky Hall;* nor shall it be lawful for the said trustees to make or construct works within the limits aforesaid under and by virtue of the said recited Acts, save and except such as shall be absolutely necessary in order to deepen the said river to nine feet at neap tides in every part thereof, in terms of the said recited Acts, and then only in the event of its being found impracticable to obtain the said depth of nine feet by dredging, scouring, and cleansing the said river or channel by machines worked by the power of steam or otherwise; such necessity and impracticability to be determined by the opinion of two eminent civil engineers, one to be named by the said trustees, and the other by the proprietor for the time being of the said estate, and, in the

event of their differing in opinion, by a third engineer to be named by these engineers: provided always, that it shall be lawful for the said trustees to deepen the said river by dredging, scouring, and cleansing the bed or channel thereof within the said limits, by machines worked by the power of steam or other machinery, to the extent of thirteen feet, authorized by the present Act; reserving always to the proprietor of the said estate, in case such works shall be constructed, all claims for damages, in manner directed by the said recited Acts or by this Act.

In 1840 a wider scheme was taken up, for making wet docks and other works which would require the taking of lands; and a plan was prepared by an engineer, marking what those works were to be, and what the navigable channel of the *Clyde*, both within high-water mark and above high-water mark, was intended ultimately to be. And compulsory powers for purchasing the necessary lands were given, but those powers were not to be exercised after 1848. I will read part of the Act obtained in 1840 with this object:

By sect. 11 the trustees are empowered not only to execute and continue the several works authorized by the said recited Acts, but also, under the provisions and restrictions hereinafter enacted, to make, &c.,

The additional works upon, in, or along the river, and in connexion with the said harbour, delineated or represented on the map or plan hereinafter mentioned.

By sect. 44 the trustees

Are empowered to construct and carry on the several works for deepening, widening, and improving the navigation of the said river and harbour mentioned in or authorized by the said recited Acts, or delineated or described on the said map or plan, and sections, and authorized by this Act, until the said river and harbour throughout every part thereof shall have attained at least the depth of seventeen feet at neap tides, for the safe and easy navigation of ships to and from the *Broomielaw* or harbour of *Glasgow*, and the wet dock and other works hereby authorized to be constructed.

Sect. 45 is for the protection of the property of *Erskine* belonging to Lord *Blantyre*, and the properties of *Frisky Hall*, *Corsedelf*, *Auchentorlie*, and *Dumbuck*, but with this proviso:

Provided always, that it shall be lawful for the said trustees to deepen the said river, by dredging the bed or channel thereof, within the said limits, by machines worked by the power of steam or other machinery, to the extent hereby authorized.

Now pausing here, I think it clear from 1848 till further legis-

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lation, the position of the *Clyde* Trustees was this, they had powers from time to time to widen and deepen the navigable channel of the *Clyde* between high and low-water mark, till it had attained the depth of seventeen feet, and it was "of as great a width as might be expedient for enabling vessels resorting to the harbour of *Glasgow* to pass each other with safety or facility." There was no limit as to the time within which this power was to be exercised, and no consent on the part of those interested in the land lying below high-water mark was required, but satisfaction was to be made to the owners of heritages adjacent to or in the river or firth of *Clyde*, which might be injured or damaged by or in consequence of the said operations. And not only were such portions of the lands of *Erskine* as lay below high-water mark, within this general power, but in the clauses introduced for the protection of the Lords *Blantyre* and others, provisoes were introduced expressly declaring that these powers should be exercised there.

The trustees had also powers given them to purchase certain lands, including those below high-water mark, by consent, and they had formerly powers to purchase them compulsorily, but those last powers had expired in 1848. By an Act of 1857, fresh compulsory powers to purchase some of those lands was given, but those powers were to last only for three years.

When the *Clyde* Trustees went in 1858 before Parliament for a further Act, the last thing which the *Clyde* Trustees could have wished was that the Legislature should take away these powers which they possessed to widen and deepen the navigable channel below high-water mark. And considering how useful and reasonable those powers were, how much good they had done, and how no hardship had ever been inflicted on anyone by their exercise, and reading the preamble of the Act of 1858, which, after reciting the previous Acts, and

> That the great and continued increase of the shipping and trade of *Glasgow*, consequent on the improvement of the said river and harbour, renders it necessary that, in conformity with the provisions of the recited Acts, the navigation should be further enlarged and improved, and additional accommodation afforded in the harbour, and whereas it is also expedient that the said several Acts should be repealed, and their provisions consolidated and amended,

I think it is not too much to say that the last thing the Legislature could have wished to do was to take away those powers. But

the Act of 1858 has been drawn with such unlucky want of skill, as really to afford plausible ground for the argument at your Lordships' bar, that whatever was meant, the Act as passed expresses an intention to take away these powers. It is a singular instance of the haphazard way in which the Act has been framed, that the clearest and most explicit declaration of the intention of the Legislature to preserve those powers is contained in the proviso at the end of sect. 84, which is a re-enactment of the 45th section of the Act of 1840, for the protection of the properties of *Erskine*, the properties of *Frisky Hall*, *Corsedelf*, *Auchentorlie*, and *Dumbuck*: "provided that it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof within the said limits, by machines worked by the power of steam or other machinery, to the extent authorized by the recited Acts and this Act."

After repealing by sect. 3 the recited Acts, "subject to the provisions of this Act," and incorporating the *Lands Clauses Consolidated Act* of *Scotland*, and other general Acts with modifications, we come in order to see what those provisions alluded to in sect. 3 are to sect. 76. As I read it, the draftsman has here lumped together eight different matters. For some the powers to take lands compulsorily would be requisite. For some those powers are not required. I will read this curious piece of draftsmanship in an abbreviated form:—

"The undertaking of the trustees shall," in terms of the recited Acts "consist of the deepening, widening, or confining, dredging, improving, and cleansing the river and harbour until a depth of at least seventeen feet at neap tides has been attained in every part thereof;" that is one object; "the altering, directing, or making the channel of the river through any land, soil, or ground, part of the present or former course or bed of the river;" that is a second object; "the forming and erecting on both sides of the river of such jetties, &c., for making and maintaining the channel of the river within proper bounds as the trustees shall think necessary;" that is a third object; "the digging or cutting the soil or banks of the river *or bed thereof*, and laying the same upon the most convenient banks of the river;" that is a fourth; "the cleansing, scouring, and opening any other streams, brooks or watercourses

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which now fall into the river, and the digging and cutting the banks of the same for improving the navigation of the river, the digging, removing, carrying away, and using such earth and other materials therein, upon, or out of the said land as the trustees shall think fit, either for improving the navigable channel of the river, or for bringing in any other streams, brooks, or water-courses to the river, or for bringing up a greater quantity of tidal water in the river;" that is a fifth; "the erection and maintenance of wharfs, &c., the erection, construction, and mooring of such beacons and buoys as may be necessary in the harbour and in the river;" that is a sixth; "the construction and completion of the several wet docks, river-dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorized to be made and maintained;" that is a seventh; "and the repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient, subject to the provisions of this Act and the Acts herewith incorporated, the trustees are hereby authorized and empowered to carry on and complete the whole or such and so many of the said works as to them from time to time shall seem expedient;" that is the eighth and last object.

What is the meaning of the phrase "in terms of the said recited Acts." It is no doubt a very extraordinary way of carrying out the announced intention of the Legislature to repeal the former Acts, and consolidate their provisions, to say that the powers of the trustees for deepening and widening the river shall be just the same as if the repealed Acts were still in force; but if it does not mean that, what does the phrase mean? I think it does mean that, and so thinking, I come to precisely the opinion much more briefly expressed by the Lord President.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th April, 1881.

Agents for Appellants: *Grahames, Wardlaw, & Currey.*
Agent for Respondents: *W. A. Loch.*

[HOUSE OF LORDS.]

SCOTT AND OTHERS . . . . . APPELLANTS;
HOWARD AND OTHERS . . . . . RESPONDENTS.

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1881
March 24.

Personal and Real Property—Privileges stipulated for in Conveyance of Heritable Subjects—Jus quæsitum tertio—Theatre.

Trustees acting for the shareholders or rentallers of a theatre, called the *Queen's Theatre and Opera House*, who had obtained a feu right to the site, granted in 1858 a disposition of the ground and buildings to one *J. B.*, subject, *inter alia*, to the real burden of a perpetual annuity of £2 per share to each rentaller of the said *Queen's Theatre and Opera House*, and to the successors or assignees of them; and it was further declared that each of the said rentallers, or the assignee or successors of such, should at all times be entitled, *inter alia*, to free admission to the auditorium of the said *Queen's Theatre and Opera House;* also declaring that *J. B.* should not convert the said theatre to any other use; and that he should keep it open for performance six months in each year. There was no stipulation as to insurance of the theatre or as to the rebuilding of it in case of destruction by fire or otherwise.

In 1865 the theatre was entirely destroyed by fire, and was rebuilt by *J. B.'s* trustee and called by another name.

In 1875 it was again entirely burnt down, and again rebuilt.

From 1865 to 1879 the theatre, under the new name, was twice sold, but in each case the conveyance was granted subject to the "real burdens, conditions, provisions, declarations, and others," specified in the original disposition of 1858, and especially under the burden of payment of the annuities to the rentallers, and of allowing "these parties the privileges to which they are entitled." The privilege of free admission was enjoyed by the rentallers for fourteen years after the destruction of the first theatre. But in 1879 disputes arose as to the validity of the rentallers' right to, *inter alia*, the privilege of free admission. The trustees maintained that the rentallers were entitled under the disposition of 1858 and the succeeding conveyances to the same privileges in the new theatre which they had in the first:—

Held, affirming the decision of the Court below, that the privileges conferred on the rentallers by the original dispositions—other than the payment of the annuities, which was constituted a real burden—rested only on the personal obligation of the original disponee, and were confined to the theatre then in existence; and that the subsequent deeds, to which the rentallers were not parties, were not intended to, and did not, confer on them any new right.

APPEAL from the Second Division of the Court of Session, *Scotland.*

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This action was originally raised by *Thomas Scott* and others, the Appellants, as trustees for a body of persons known as rentallers or shareholders of the *Theatre Royal Edinburgh*, who claim certain rights of admission to that theatre, against the Respondents Messrs. *Howard* and *Logan*, lessees of the theatre, and the *Edinburgh Theatre Company, Limited*, who are the proprietors.

The questions raised are (1.) whether the rentallers are individually entitled at all times to free admission to the auditorium of the theatre, except to certain private boxes, and to book and secure their places beforehand without charge whenever that privilege is enjoyed by the public; and (2.) whether the Appellants, as trustees, have the sole and exclusive right to use the private box in the theatre set apart for them, and to occupy the same by themselves or others to whom they may give permission to occupy it.

Previous to 1829, the ground on which the theatre was built was devoted to the purpose of a circus, which was afterwards converted into a theatre called the *Caledonian Theatre*. In 1829 the lease of the ground and buildings was acquired by a body of shareholders, called rentallers, of whom the present Appellants are the successors, and the theatre received the name of the *Adelphi Theatre*.

In May, 1853, that theatre was destroyed by fire, and while it was in the course of being rebuilt by the shareholders, they obtained from the governors of *Heriot's Hospital*, who had become owners of the site, a feu charter dated the 13th of November, 1854, by which the former leasehold right was changed to a feu right. This charter was in favour of Dr. *Robert Jefferiss* and others, "in trust for behoof of such person or persons as now or shall hereafter become shareholders of the edifice or building now in course of being erected on the site of the *Adelphi Theatre*, and premises therewith connected, all lately destroyed by fire. In this charter the shareholders are taken bound to erect and maintain buildings of the value of £2000; but it does not require that they shall use it as a theatre.

The theatre when rebuilt was called the *Queen's Theatre and Opera House*, and opened in 1855.

In 1857 the shareholders sold the theatre to Mr. *John Brown* of *Marlie*, and a disposition in his favour was granted by Dr. *Jefferiss* and others, as trustees, dated the 28th of May, 1858. The subjects conveyed to Mr. *Brown* were the whole area on which the theatre stood, together with the theatre itself, and the shops and others adjoining thereto, with the whole furnishings and fittings. The chief consideration given by Mr. *Brown* for the sale was his undertaking to relieve the trustees of all debts upon the building, which debts amounted to about £14,000; secondly, it was expressly provided and declared that the subjects were disponed under the real burden of payment of a perpetual annuity of £2 per share to each of the shareholders or rentallers of the theatre, whose number was about 100, and whose names were inserted in a schedule signed as relative to the conveyance, and to their respective successors and assigns; and thirdly, it was further provided and declared, that each of said shareholders or rentallers, or the assignee or successor of such shareholder or rentaller, shall at all times be entitled to free admission to the audience department of said theatre other than the present private boxes and the box presently set apart for us, the first and second parties hereto, as trustees aforesaid, and which box shall continue to be set aside for the sole use of us, the said first and second parties, as trustees aforesaid and our successors in office; but declaring that said right of free admission shall be personal to each shareholder or rentaller, and that such shareholder or rentaller shall not be entitled to substitute any one in his or her right to admission, to whom the share itself shall not have been transferred in manner before expressed; and further, in the event of a share being acquired by more than one individual, only one of such individuals shall be entitled in virtue thereof to free admission to said theatre as aforesaid, and also providing and declaring that the said *John Brown* and his foresaids shall not be entitled, without the consent of the said shareholders or rentallers and their foresaids, to convert the said theatre and opera house to any other use or purpose than a theatre and opera house; and also providing and declaring that the said theatre and opera house shall be kept open for performance during at least six months in each year." In the following July Mr. *Brown* died uninfeft; and infeftment on

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the disposition in his favour was taken by Mr. *William Shaw Soutar* his testamentary trustee.

In 1865 the theatre was again destroyed by fire; and in 1866 Mr. *Soutar* built on the same site another theatre at a cost of £17,000. The new theatre was opened as the *Theatre Royal*, and, as had been the case in the previous edifice, a private box was set aside for the sole and exclusive use of the trustees; and the shareholders or rentallers exercised their right of free admission in terms of the declaration in their favour in the disposition to Mr. *Brown*, and in Mr. *Soutar's* sasine of 1858.

In 1874 Mr. *Soutar*, as Mr. *Brown's* trustee, sold this theatre to the present Defender Mr. *Logan* for £11,000, with entry at Martinmas, 1874; but before the price was paid, and any conveyance delivered, the theatre was entirely destroyed by fire on the 6th of January, 1875. The building had been insured for £12,000, and Mr. *Logan* having, after some delay, received a conveyance to the subjects proceeded to re-erect a theatre on the site. In this disposition, which was recorded on the 27th of April, 1875, the subjects were disponed to Mr. *Logan*, his heirs and assignees, "with and under the real burdens, provisions, declarations, and others specified in the instruments of sasine, dated 1858, in favour of Mr. *Soutar* as Mr. *Brown's* trustee, "declaring that the whole subjects are so disponed with and under and subject to the whole burdens incumbent on me the said *William Shaw Soutar* as trustee aforesaid, or on the trust estate of the said *John Brown* under the titles of said subjects, . . . and specially without prejudice to the said generality, the said *William Hugh Logan* and his foresaids shall henceforth pay the annual sums or annuities due to the rentallers or shareholders whose names are enumerated in the schedule hereto annexed, and to the successors or assignees of said rentallers or shareholders, and to such other person or persons as may establish their right as shareholder or shareholders, and allow these parties the privileges to which they are entitled."

Mr. *Logan* while in the course of erecting the theatre, sold it to the *Edinburgh Theatre Company* by disposition dated and recorded on the 23rd of December, 1875. This conveyance contained similar conditions as to paying the annuity to the rentallers or shareholders, and as to allowing "these parties the privileges to

which they may be entitled," as in the disposition in favour of Mr. *Logan*. There was also attached to this disposition a schedule containing the names of 104 rentallers or shareholders.

The Edinburgh Theatre Company, Limited, was incorporated under the *Companies Acts*, 1862 and 1867. And in the prospectus issued by the promoters it was stated that one of the principal burdens on the property was the annual payment of £2 per share to each of eighty-two renters, who were also entitled to free admissions.

In 1876 the theatre was opened under the name of the *Theatre Royal* by Mr. *Logan* and Mr. *Howard* as co-lessees under a lease from the proprietors. By this lease, dated the 24th of December, 1875, the subjects were let to Messrs. *Logan* and *Howard* under an obligation to keep the theatre open as a place for dramatic and theatrical entertainments therein for a period of not less than six months in each year, and under the special provision and declaration that the rentallers should be entitled to all rights of admission to which they were entitled under the provisions contained in the disposition of 1858 by Dr. *Jefferiss* and others, to Mr. *Brown*. The lessees are also taken bound "to set apart for the sole use of the trustees of the said rèntallers or shareholders and their successors in office in the event of the said trustees establishing their right thereto, a private box in the said *Theatre Royal*."

After the theatre was opened disputes arose between the rentallers and the lessees as to booking seats and as to the trustees' box, and eventually, by letter, dated the 2nd of October, 1879, the lessees intimated to the Appellants that they were resolved to resist the claims of the rentallers in booking seats as formerly; and that they were advised that the trustees had no right of admission for their friends to the trustees' box, and that after that date they would refuse to admit them.

The pleas in law for the Appellants were:

(1.) The Pursuers are entitled to decree in terms of the declaratory conclusions of the summons, in respect (*a*), that on a sound construction of the disposition of 1858, and *separatim*, by virtue of the said deed, and of the usage which has followed upon it, the Pursuers, and the other shareholders or rentallers of the *Theatre Royal*, have a right of free admission to all parts of the audience department of the said theatre, except the boxes corresponding to the private boxes and trustees' box as then existing, and to book or secure seats beforehand, on equal

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terms with the public; and (*b*), that on a sound construction of the said disposition, and *separatim*, by virtue thereof, and of the usage which has followed upon it, the Pursuers, as trustees foresaid, are entitled to the sole use of the box known as the trustees' box, and to occupy the same by themselves or others.

(2.) The Defenders, *Howard* and *Logan*, having invaded the Pursuers' rights as rentallers and as trustees, and the rights of the other rentallers in the manner complained of, are liable in damages as concluded for.

The pleas in law for the Respondents were:

(1.) No title to sue. (2.) The right of free admission, conferred upon rentallers by the disposition to Mr. *Brown*, applied only to the *Queen's Theatre and Opera House*, and ceased and lapsed by the destruction of that building by fire. (3.) As the said disposition contained no obligation upon the disponees to rebuild the theatre which it expressly conveyed, and to which exclusively its clauses and conditions applied, no right can be held as existing in rentallers to free admission to a theatre erected on its site after its destruction. (4.) The destruction of the *Queen's Theatre and Opera House* equally extinguished the right to the use of a theatre box, conferred by the said disposition upon the trustees therein mentioned. (5.) In any view, the right to the use of a theatre box is, under the said disposition, made personal to the trustees, and is not communicable by them to their friends.

The Respondents lodged a minute in which they admitted:

The rentallers of the theatre have had free admission to all parts of the theatre other than the private boxes, and that they have been in use to book and secure seats therein beforehand without payment from the year 1857 to 1865, when the theatre was burned down, and from the time the new theatre was thereafter built until the year 1875, when it was burned down, and since January 1876, when the present theatre was opened, down to the 2nd of December, 1879.

On the 30th of March, 1880, the Lord Ordinary found for the Appellants, subject to the qualifications: (1) that none of the shareholders or rentallers of the *Theatre Royal* mentioned in the summons are entitled to free admission to any of the private boxes presently existing in the said *Theatre Royal*; and (2) that no trustee is on any one night entitled both to introduce friends into the trustees' box, and himself personally to have free admission to any other part of the theatre; further, that not more than four persons shall on any one night occupy the said trustees' box.

The Respondents having reclaimed, the Lords of the Second Division, on the 22nd of June, 1880 (1), recalled (dissenting Lord *Ormidale*) the Lord Ordinary's interlocutor; and sustained the second, third, and fourth pleas in law for the Respondents, and assoilzied them from the conclusions of the summons.

(1) Court of Sess. Cases, 4th Series, vol. vii. p. 997; 17 Scot. Law Rep. 678.

On appeal,

March 22, 24. *The Solicitor-General for Scotland* (Mr. *J. B. Balfour*, Q.C.) and Mr. *Benjamin*, Q.C., maintained for the Appellants that the Respondents were under the obligation to fulfil in the *Theatre Royal, Edinburgh*, the privileges of admission stipulated for in the disposition to Mr. *Brown*. There was no ambiguity as to what those privileges were, for in each successive deed they had been identified by express reference. There was no uncertainty as to the privileged class, for the list of the rentallers was among the Respondents' titles. Nor did any legal difficulty attend the attachment of the obligation to the existing proprietors or to the existing theatre, for each Respondent, in his title to the existing property, asserts the existence of the original privileges, and undertakes to satisfy them; and it followed that though it might be doubtful whether the Appellants could make the original disponees or his assignees rebuild the theatre, yet so long as the ground was occupied by a theatre the privilege of the Appellants remained in force; and the reinstating of the theatre was a reproduction of the theatre, and the privileges attached. Even if the right was held to be extinguished with the original theatre, still it was within the competency of successive disponers to expressly constitute the right. And this they had by the direct obligation undertaken in the deed of 1874 by the fresh disponee to allow the Appellants the privileges claimed, and whether the disponer in that deed considered the parties were entitled to the right or not, that did not matter, the right of the party claiming did not depend on the belief of the party making it, but upon the obligation made. They submitted that under the deeds and the continued usage the Appellants were entitled to the privileges claimed.

Sir *F. Herschell*, S.G., and Mr. *E. E. Kay*, Q.C. (with them Mr. *J. Rhind*), contended for the Respondents that in the deed of 1858, on which the Appellants mainly depended, there was no provision for the perpetual existence of the rights claimed by them. The language used was only applicable to the then present theatre; and the absence of any clause as to rebuilding or even insuring the theatre confirmed this view. Further, they submitted

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the language was specially chosen so that the right should not be perpetual, for it must have been in the parties' minds in 1858, that the theatre might be burnt down again, and that the land might be leased out for something very different. As long as it could be said that it was the same "said theatre," however much altered, the right is not gone; but that could not be said. Then the Appellants not having the rights claimed in regard to the present theatre, under the deed of 1858, those rights were not created by the subsequent deeds. For the proper construction to be put upon the clauses in the disposition by Mr. *Soutar*, in 1874, was, that they were not donative clauses to the spoliation of the trust, but defensive clauses specially chosen to exclude any idea of creating a new right which did not exist before.

They did not dispute that a deed may stipulate for a benefit or a right to enure to a person not a party to the deed; but to prove that, it must be shewn beyond doubt that it was the intention of the parties to the deed to create that right: *Podché* v. *Brown* (1); but it was impossible to say that when a man makes a contract "to allow certain parties the rights they are entitled to," that was creating a new right.

Then with regard to the practice of the Appellants, practice alone never can reconstitute upon a Scotch heritable subject—and English law is similar—a condition or privilege stipulated in the title to the subject, which has become extinguished. At best, practice is an exponent of ambiguous words only when it is the practice of the users of the word. It then shews what the users of the words meant by them.

The Solicitor-General for Scotland, in reply.

The Law Peers delivered judgment as follows:

EARL CAIRNS:—

My Lords, this case lies in an extremely short compass, and for the purpose of the observations which I have to submit to your Lordships it will not be necessary for me to refer to more than two of the deeds or documents which have been commented upon in the argument.

(1) 3 Macq. at p. 71.

I will take, in the first place, the deed of 1858. If it is the case that that deed confers upon those who are called in it the rentallers, and who are represented by the Appellants at your Lordships' Bar, a right to have free admissions into whatever theatre may from time to time stand upon the ground mentioned in that deed, then of course, inasmuch as the present theatre is standing upon that ground, the Appellants are right in their contention, and do not require to refer to the other documents in the case. My Lords, that deed of 1858 is in the nature of a disposition in favour of one *John Brown*, who appears to been one of a certain number of persons who had carried on for some time prior to 1858 the *Queen's Theatre and Opera House* in *Edinburgh* as an adventure, in which they were all interested, and the expenses of which they had, in some way or other, among themselves provided. They appear, for some reason, to have been anxious to change that state of things, and for the future to make *John Brown* the person who would be the owner of the property and who would carry on the theatre; and, accordingly, the deed is itself a conveyance to this *John Brown*.

Now, the consideration of the deed appears to me to be that *John Brown*, in place, as I understand it, of paying the purchase-money to them, undertook to pay, and in point of fact did pay, the debts owing upon the concern and relieve his co-adventurers of those which were not actually paid by him at the time. That was the consideration on the one side. In return, the co-adventurers seem to have had two considerations passing to them. The one was a burden upon the property of an annuity of £2 sterling to each of the rentallers, that sum, I suppose, representing in some rough way the interest upon the money which each had contributed. The other was certain conditions for free admissions which were secured to them.

What passed to *John Brown* was the ground upon which the property stood (which, I understand, was held in feu of the governors of *Heriot's Hospital*), and the edifice, which is thus described: "The edifice now called the *Queen's Theatre and Opera House*, and the shops and others adjoining thereto or connected therewith, all erected on the area or piece of ground above described, and the whole furnishings and fittings of and in

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said whole buildings, as well heritable as movable." We all know that the furnishings and fittings of a theatre, the movable property, are generally of very considerable value. No doubt they represented an important item in that which was conveyed to *John Brown*. Then, to pass over a provision for the payment of the annuity of £2 to each rentaller, the privilege of free admission is thus described: "Providing and declaring that each of the said shareholders or rentallers, or the assignee or successor of such shareholder or rentaller, shall at all times be entitled to free admission to the audience department of said theatre, other than the present private boxes and the box presently set apart for us, the first and second parties hereto, as trustees foresaid, and which box shall continue to be set aside for the sole use of us, the said first and second parties, as trustees foresaid, and our successors." Then, further on, "in the event of a share being acquired by more than one individual, only one of such individuals shall be entitled in virtue thereof to free admission." Then it provides and declares that *Brown* shall not be entitled, without the consent of the shareholders or rentallers, "to convert the said theatre and opera house to any other use or purpose than a theatre or opera house," and also providing and declaring that the said theatre and opera house shall be kept open for performance during at least six months in each year; and in the event of the said *John Brown*, or his foresaids, letting the said theatre and opera house to the lessee or tenant for the time being of the *Theatre Royal, Edinburgh*, he shall take such lessee or tenant bound so long as he continues tenant or lessee of said *Theatre Royal*, to give the shareholders or rentallers of the said *Queen's Theatre and Opera House* free admission to the said *Theatre Royal*."

Now, my Lords, every word of that is a stipulation guardedly and carefully connected with this "said *Theatre Royal*;" that is to say, the edifice which then stood upon the ground called by that name. It appears to me that, stopping there, there is nothing in any one of those sentences which would enable you to say that if, without any act done by *Brown* himself, something has happened which causes that edifice entirely to disappear and no longer to be in existence, there is an engagement on the part of *Brown* to give this right of free admission to a wholly different building. Sup-

posing it had been the case that, under the last sentence I read, in place of continuing to occupy it himself, he had let the building to a tenant, and the building had disappeared, so long as that building was there he was bound to make the tenant agree to continue the right of free admission; but could it be contended that the tenant would be under an obligation if he subsequently substituted a different building upon the property, to continue this free right of admission? It was put in argument by the learned counsel at the Bar, Would *John Brown* be bound, or would his tenant be bound, if the theatre was burnt down, to build upon the ground another theatre? Might he not build a house of a different kind? It would be very difficult indeed to contend that there was anything here which would oblige him to replace the theatre, if it was burnt down, by another theatre. There is no such contract in any part of the document.

Then let us see what the reason of the thing would lead us to expect to find. This theatre, as I pointed out, with all its furniture and fittings, was provided, apparently, in the first place, by the money of the adventurers, and that money was repaid to them by *Brown* as the purchase-money for the theatre. It was quite natural that when they were dealing with that which had been provided by their own money, they might, as part of the consideration in parting with it, in favour of *Brown*, make a stipulation for free admission into that building which they virtually had built; but is there any such reason for supposing that, without any stipulation binding them to contribute to the expense of a new theatre, they could have imagined that they would have a similar right to extend their right of free admission into another theatre, provided, not by their own money, but by the money of another person? Then, again, if it had been intended that this right of admission should pass from the existing theatre to a new theatre, one would have expected to find stipulations as to effecting insurance, as to keeping up the insurance, as to employing the money secured by the policy in rebuilding a theatre of a similar kind if the existing one had been burnt down; and, indeed, express stipulations as to the new building and the right of admission to the new building. But we find nothing of the sort, and yet it is impossible not to see that the possibility of the theatre

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being burnt down would be in the minds of those who were entering into this contract, because in point of fact the theatre had been burnt down only a few years before.

My Lords, I therefore come to the conclusion that upon this deed, if it stood there, and if the question had been brought before your Lordships, no other deed having intervened, but the theatre having been burnt down and rebuilt, we will say by *Brown* or by some one representing him, if the case had arisen upon that state of things, I do not see how anyone of those rentallers could have maintained seriously his right to have a free admission into the new theatre. Indeed, I am bound to say that I do not think that the learned Judges of the Court below, who took the view for which the Appellants contend, rested their opinions so much upon the deed of 1858 as upon the subsequent deed.

Then, my Lords, as to the subsequent deed the case is this: it is said, even supposing that we, the Appellants, cannot support our case upon the deed of 1858, still after the theatre was burnt down and after a new theatre was erected, there comes another deed in 1874 (in the meanwhile the property had passed from *Brown* to his trustee *Soutar*), and in that other deed there are stipulations contained, no doubt, as between *Soutar* and the person to whom he was selling, by which *Soutar* stipulated in favour of the rentallers in words which seemed to secure to them this right of free admission, and the person who took under this deed from *Soutar* was therefore bound by that deed to give those rentallers the right which *Soutar* stipulated for in their favour, whether they would or would not have been entitled to that right under the earlier deed.

Now there again, my Lords, I am bound to say in the first place, that it would have been a very singular thing if *Soutar* had been found to have stipulated in favour of the rentallers for these rights, supposing that they had not got them already. *Soutar* had no interest in doing so; he was not in any way concerned for the rentallers, he was simply acting as the representative of the estate of *John Brown*, and trying to do the best he could for that estate, trying to get the largest sum of money he could in parting with this property. Of course the closer the bargain he was making for conditions for third persons, the less he would get for that estate. I therefore certainly should expect to find very clear

and unambiguous provisions before I could come to the conclusion that Mr. *Soutar*, of all people in the world, was securing for those rentallers something which the rentallers were not entitled to. But, on the other hand, looking at Mr. *Soutar's* position, it is exactly what one would expect to find, that in selling this part of the estate for which he was a trustee he would take very good care that he would not, by anything that he did in his conveyance, prejudice any existing right on the part of third parties, because in doing so he would very possibly bring upon himself, or bring upon the estate of which he was a trustee and representative, some claim from those persons whose rights he might thus be supposed or alleged to have prejudiced by the form of his conveyance.

That, of course, my Lords, is merely an *à priori* observation, and does not decide the case. It may be that the words are so clear that we shall find that the rights were actually created for the benefit of the rentallers, but if any other exposition can be given to the deed, that other exposition would certainly be more in accordance with the antecedent probability of the case.

Now when I look at this deed of 1874 (I will not complicate the case by referring to the subsequent lease) the words in that deed seem to me to be nothing more than words of ordinary style, fitted and calculated for passing on to the person taking under the deed any obligation which at present was existing in connection with the property, not at all words which in any way necessarily create any new obligation or new benefit for any third party:—"Declaring always that the whole subjects and others hereby disponed, are so disponed with and under and subject to the whole burdens and others incumbent on me the said *William Shaw Soutar*, as trustee aforesaid, or on the said *Allan McLaren Brown*, or on the trust estate of the said *John Brown*, under the titles of said subjects from and after," a certain date, "and specially without prejudice to the said generality, the said *William Hugh Logan* and his foresaids shall thenceforth pay the annual sums or annuities due to the rentallers or shareholders whose names are enumerated in the schedule," "and allow these parties the privileges to which they are entitled." There is no enumeration of the privileges; there is not even a recital here in the earlier part of the deed of certain privileges of free entry. There is

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simply a use of those general words in order to answer which you must first satisfy yourselves as to what the privileges are to which the persons at that time were entitled, that is to say, entitled in point of law. It is not to continue to them advantages which they had been used to have, which they were enjoying *de facto*, but to continue to them privileges which they were entitled to *de jure*. That is what is secured to them and only that.

My Lords, I cannot see there a single word which in any way creates for any third party any new privilege. It leaves the rentallers in the enjoyment of everything they had in point of law and gives them nothing further. That I understand to be the view which was taken by the majority of the learned Judges in the Court of Session. It seems to me most satisfactory, and I therefore move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN :—

My Lords, I so entirely agree with what has been said, that I scarcely think it necessary to do more than point out the particular things upon which I think the matter turns, and say that I agree in what has already been said upon them.

I think the first question of all is upon the deed of 1858. What was it that the parties meant by that deed, and what is the effect of the instrument as far as regards this privilege of admission to the theatre? It seems quite clear that it was agreed first of all that there should be an annuity of £2 a year secured upon the land as a real burden, and it was intended that that annuity should be transmitted with each share, and a special manner was provided in which the share might pass. Then there was added that besides the annuity passing with the share, there should also pass the privilege of free admission after mentioned, and that privilege of free admission after mentioned is stated at page 39, letter B., in these words: "be entitled to free admission to the audience department of the said theatre, other than the present private boxes," and so forth. Now what does that mean? It would have been perfectly competent to the parties, if they had wished it, and had expressed it, to say, there shall be free admission to this present existing theatre, so long as this present existing theatre continues to exist, and no longer. If they had said that,

nobody could have doubted their meaning or that it could be carried out. Or they might have said, there shall be a right of free admission to this present theatre so long as it exists, and if this present theatre is destroyed by fire or other accident the disponee shall be obliged to erect another theatre, and give us a similar right of admission into the other theatre when it is erected. They might have done that, but certainly it is pretty clear upon this deed that they have not done it. There would have been a great many provisions required to be made if they had been going to do that; it would have been necessary to provide who should furnish the money and so on. But there is nothing said about it.

My Lords, there is a third provision—what I may call a half-way provision, which they might have agreed to—they might have said: "we (the rentallers) shall be entitled to free admission to this theatre as long as it exists, and if it perishes by fire, the disponees shall be under no obligation to rebuild it, but if they should rebuild the theatre they shall be under an obligation to give us free admission into the new theatre when rebuilt, as much as into the old one." There would have been the same difficulties to some extent as before—nearly all the same difficulties as before if that had been done—difficulties about providing who was to furnish the money and so on. I mention this, because I think that the Lord Ordinary, though he does not in express terms say so, must have persuaded himself that the meaning of the deed of 1858 was to adopt the middle course I have spoken of. He does not give his reasons for that, and I have looked in vain to find them. I do not think that that would be the natural and *primâ facie* thing that one would expect the parties to do, and I cannot find a single word in the deed of 1858 doing it.

I come, therefore, to the conclusion that under the deed of 1858 the shareholders would have a right of free admission to the theatre as long as that theatre continued to exist, and yet when that theatre was destroyed by fire, that right of free admission was gone—had perished with the theatre—and was not revived when the new theatre was built in its place. That I think is the opinion of the majority of the learned Judges of the Court of Session, that is to say of the two Judges whose opinion at present stands; and I can only say that I agree in it.

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Then it was said (and that, I think, is the ground upon which Lord *Ormidale* put it) that the right was given by a subsequent deed of conveyance. I do not think it is necessary to refer to the same terms in subsequent deeds, because in the deed of 1874 these are the words which are relied upon. In that deed there is a conveyance of this property subject to all the burdens that were imposed by the deed of 1858; and then come the words, "and specially without prejudice to the said generality the said *William Hugh Logan*" shall pay annually the sums or annuities due to the rentallers or shareholders, and their successors and assignees, "and allow these parties the privileges to which they are entitled." Now it is to be observed that that is mentioned "specially and without prejudice to the said generality," as one of the burdens imposed by the deed of 1858, and if the burden imposed by the deed of 1858 had been a burden to admit them to the same privileges in any subsequently-built theatre, I have little doubt that that would have continued it to them. But if there was not that burden to admit them to any subsequently-built theatre, can it be said that this creates *de novo*, and gives a fresh right to these rentallers, and that it was intended to do that by these words? I think not. I think you must look at the words in their natural meaning and signification, and I am convinced that it must have been the object of the parties to say this: We do not say whether or no under the deed of 1858 you, the rentallers, have a right to enter into the substituted theatre as you had into the old one. Mr. *Soutar*, judging from his expression, seems to have rather assumed that they had; but the parties do not say in the deed whether they have it or not. They say, If the rentallers have that right, we specially agree that you, the disponees, must keep it up, but we do not settle one way or the other whether they have that right, or if they assert that they have that right, and you assert that they have not, you two must fight it out between you. I (Mr. *Soutar*) have nothing to do with that. That, my Lords, certainly seems to me to be what is intended.

Lord *Ormidale*, I observe, says he cannot think that that is the meaning of it. He says, after quoting the words I have just read, "This cannot, I think, on any fair principle of construction, be

held to mean, as was contended by the Defenders, merely to import a reservation of the rentallers' claim to privileges, if they had any." He does not explain why he does not think that is a fair construction. I own it strikes me very much that that was what they really intended to do. He says they might have expressed it more clearly. Perhaps they might. I scarcely know anything that is so expressed that it might not have been put in clearer language; but certainly, if they meant that which Lord *Ormidale* says they meant, namely, we give this privilege which they assert now exists, I think they might have used clearer language than they have done if that was their meaning. I confess, my Lords, that my own impression is strongly that the meaning of the words, upon any principle of construction that should be applied, ought to be exactly that which Lord *Ormidale* thinks it was not. Taking that view of the matter, I think this deed cannot possibly give any new privileges, and consequently there is no ground whatever for maintaining the contention of the Appellants founded upon it.

The next deed of conveyance is in exactly similar terms, and carries the matter, therefore, no further. Then comes the lease, which is expressed in words of a different kind altogether; but it is sufficient to say that if the conveyances do not give the privilege, certainly the lease cannot.

LORD WATSON:—

My Lords, the Appellants are the representatives of a body of gentlemen who up to the year 1858 were the beneficial owners of the *Queen's Theatre and Opera House* in *Edinburgh*, and of the land upon which it was built. In the year 1858 they sold the subjects to the late Mr. *John Brown*, a conveyance being granted by the gentlemen who held the property in question in trust as feuars from *Heriot's Hospital*. The considerations upon which the conveyance was granted were three: First, that the purchaser, the disponee, should pay debts owing by the rentallers to the amount of £14,000; secondly, that each of them should be secured in perpetuity an annuity of £2 per annum over the subjects conveyed; and thirdly, that they should have a certain privilege of admission to the then existing theatre, that last stipulation being the one which has given rise to the present contention.

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The annuity was intended to run with the lands, and accordingly it has been effectually made a real burden, but the privilege of admission to the theatre, which was the third consideration, is a right of a description which cannot according to the law of *Scotland* be made a feudal burden. It is a mere personal right, a right by contract, and if transmitted at all, it must be transmitted by its being made successively a matter of contract with all the subsequent disponees who are not the representatives of the original purchaser. It would have been perfectly valid so long as it existed, and was in vigour as against Mr. *Brown* and as against the representatives of Mr. *Brown*, but it would not have been of any force whatever against a third party, a purchaser from Mr. *Brown* or his representatives, unless it was imposed as a personal obligation upon them by the deed of conveyance which they obtained.

My Lords, the circumstances requiring to be noticed further are these: The property has been held successively by two purchasers who are not the representatives of Mr. *Brown*.

The theatre, since the deed of 1858 was granted, has been twice destroyed by fire and as often rebuilt. The Appellants maintain that the privilege accorded to them by the deed of 1858 is still extant and available to them as against the proprietor of the present theatre, and they maintain alternatively, that even although that obligation had ceased to exist by reason of the destruction of the theatre by fire, still a new obligation to the same effect had been raised by the deeds transmitting the property to the singular successors of Mr. *Brown*.

My Lords, I do not find that any countenance is given by the learned Judges in the Court below to the first of these contentions; and it appears to me for the reasons that have already been stated by your Lordships, that it is not well founded. In the first place the obligation is attached to "the said theatre;" it does not extend further, and "the said theatre" when reference is made to the antecedent must be held to be the edifice which was then standing. Further, as a condition burdening land, I think it must be strictly read; and, apart from that rule altogether, I can find nothing in the terms of the deed of 1858 which implies that there was to be either a continuing obligation to maintain a theatre upon the land disponed, or that in the event

of a fire and of a new theatre being built on the site, the disponers should have any right of admission to it. No doubt there is an obligation laid upon Mr. *Brown* and his representatives not to convert the theatre to any other purpose. No question arises under that clause. Probably Mr. *Brown* would have been entitled under it to alter the theatre, or to enlarge it without affecting the right of the rentallers; in fact it might be that he was entitled under that clause to improve the theatre by taking it down and rebuilding it; that would not put a stop to the right of the rentallers; but that is not the case which arises here. The theatre perished through no act or default on the part of the disponee or his representative, and the question which arises is whether any stipulation is to be found to the effect that the rentallers shall have access to the new theatre. My Lords, I can find no language in the deed which expresses or indicates such an intention on the part of the two contracting parties.

Then, there being no obligation extant under the deed of 1858, it is next contended that the deeds which have transmitted the feu of the land have also recreated this burden upon the owners. Now upon turning to the deed of 1874, which is in the same terms as the subsequent transmissions, what I find there is that Mr. *Soutar* in parting with this portion of the trust estate which was held by him, desired to impose upon the disponee under that deed all the obligations to which he or his author, Mr. *Brown*, could possibly have been subject under the deed of 1858; and accordingly the conveyance is expressly made subject to all the burdens, conditions, and declarations which are contained in that deed. If the deed had stopped there it could not have been contended that any greater burden was imposed than that which was to be found existing under the conditions of the deed of 1858. But then it is said that the particular words which follow have the effect of creating a new right, and these words are "to allow those parties the privileges to which they are entitled." These words, it is necessary to observe, are not inserted as a new burden or a new stipulation, but are only inserted as a particular explanation of certain conditions and declarations in the deed of 1858. I cannot read them, therefore, as meaning anything else than this: to allow to those parties the privileges to which they are entitled

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by the deed of 1858. I cannot read them as implying that the parties are to be allowed to enjoy privileges which are not accorded to them by the terms of the deed of 1858. And that, my Lords, appears to me, as your Lordships have held, to be quite sufficient for the decision of this appeal.

I would only desire to say further that the opinion of the two learned Lords of the Court of Session who took a different view of the case from the majority of the Second Division, appears to have been influenced a good deal by the state of possession which is proved to have existed in this case, the fact, in other words, that from 1865 to 1879, after the theatre referred to in the disposition of 1858 was reduced to ashes, these rentallers had for a period of years enjoyed the right of admission as fully and as freely as if the right had been given to them under the deeds. But, my Lords, it humbly appears to me that these facts as to possession cannot legitimately be taken into consideration in construing the deeds. If the deeds had been defective in any solemnity required by law; if they had been imperfect in execution, these facts might have been founded on as validating the deeds *rei interventu;* or if there had been any ambiguity such as occurred in regard to the extent of the right of free admission, I think they might have been legitimately referred to, to explain the ambiguity. But when you have deeds like these—probative deeds which embody the whole contract and obligations of the parties—it appears to me to be out of the question to refer to possession for the purpose of imposing upon their language a meaning which it does not actually bear.

I therefore concur with your Lordships in the judgment which you propose.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 24th March, 1881.

Agents for Appellants: *Simson & Wakeford.*
Agent for Respondents: *Andrew Beveridge.*

[HOUSE OF LORDS.]

COLTNESS IRON COMPANY . . . . . APPELLANTS; H. L. (Sc.)
BLACK (ASSESSOR OF TAXES) . . . . . RESPONDENT. 1881
April 7.

Income Tax—Coal Mines—Exhaustion of Pits—Deductions from Gross Profits —Statutes 5 & 6 *Vict. c.* 35, *ss.* 100 (*Rule* 3), *and* 159; 29 *Vict. c.* 36, *s.* 8.

A tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled, in computing the profits for assessment of income tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which have been exhausted by the year's working.

See Lord *Penzance's* opinion as to the method of taxation intended by the Legislature to be applicable to mines.

Knowles v. *McAdam* (3 Ex. D. 23) held wrongly decided.

APPEAL from a judgment of the First Division of the Court of Session, as the Court of Exchequer in *Scotland*, pronounced in a remit from this House, dated 1st of August, 1879.

The original appeal to this House was taken by the Appellants, the *Coltness Company*, against a judgment of the Court of Session, pronounced upon a case stated, upon the motion of the Appellants (37 & 38 Vict. c. 16, s. 9), by the Commissioners of Income Tax for the middle ward of *Lanarkshire*, in relation to an appeal taken to the Commissioners by the Appellants against the assessment for income tax made on the Appellants for the year ending 5th of April, 1879.

The case stated by the Commissioners for the opinion of the Court contained the following facts and contentions:—"The *Coltness Iron Company*, carrying on business at *Coltness*, in the parish of *Cambusnethan* and elsewhere in the county of *Lanark*, appealed against the assessment made on them under Schedule D. of the Act 5 & 6 Vict. c. 35 (1), and subsequent Income Tax

(1) The rules according to which the duty is by the statute 5 & 6 Vict. c. 35, directed to be charged upon the profits of coal and iron and other mines are contained in sects. 60 and 100.

Prior to 1866, subjects of this name, which are specially mentioned in rule 3 of sect. 60 (applicable to Schedule A.), were assessed in accordance with the rules prescribed by that section of the

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Acts, in respect to the profits arising from their business for the year preceding in so far as the said assessment includes a sum of £9027, being the costs incurred by them in sinking new pits; and for which they maintain they were not assessable."

"The *Coltness Iron Company* stated, and it is the fact, that for

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statute; but by the 8th section of the *Customs and Inland Revenue Act*, 1866 (29 Vict. c. 36), it was enacted that "the several and respective concerns described in No. 3 of Schedule A. of the said Act" (5 & 6 Vict. c. 35) "shall be charged and assessed to the duties hereby granted in the manner in the said No. 3 mentioned, according to the rules prescribed by Schedule D. of the said Act, so far as such rules are consistent with the said No. 3."

By sect. 60 (Schedule A.), rule 3, it is enacted that the annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited:—

First,—Of quarries of stone, slate, limestone, or chalk, on the amount of the profits in the preceding year.

Second,—Of mines of coal, tin, lead, copper, mundic, iron, and other mines, on an average of the five preceding years, subject to the provisions concerning mines contained in this Act...

Third,—Of iron works, gas works, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding.

By sect. 100 it is enacted—Schedule D.—that the duties thereby granted "shall extend to every description of property or profits which shall not be contained in either of the said Schedules A., B., or C., and to every description of employment of profit not contained in Schedule E., and not specially exempted from the said respective duties." . . .

Rules are then prescribed for ascertaining the duties in certain particular cases mentioned; and in the first place, with reference to the assessment of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of the Act, it is provided,—

(*Rule First*)—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed." . . .

"(*Third*)—In estimating the balance of profits and gains chargeable under Schedule D., or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of

a number of years they have carried on business as coal and iron masters, and have opened up several mineral fields, sinking new pits at their own expense from time to time as the old ones have become exhausted; and they submitted that, in ascertaining the profits upon which they are liable to be assessed under the said Act, there ought to be deducted from the gross annual receipts derived from their business the sums expended by them in sinking the said pits." "They explained, and it is believed to be the fact, that when a mineral field is wrought out, the pits on it become useless to them, and they receive no compensation from the landlord or any one else in respect of them, and that they have no means of compensating themselves for the cost of these

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such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alteration of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern; nor on account of any capital withdrawn therefrom; (nor for any sum employed, or intended to be employed as capital in such trade, manufacture, adventure, or concern;) nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts, except bad debts proved to be such to the satisfaction of the Commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an insurance or contract of indemnity."

Section 159 is in these terms—"And be it enacted, that in the computation of duty to be made under this Act, in any of the cases before mentioned, either by the party making or delivering any list or statement acquired as aforesaid, or by the respective Assessors or Commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity, or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments, nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed, or of loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation."

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pits other than out of the gross annual returns derived from the minerals worked by them."

The Appellants further contended that whatever might have been the interpretation of the law prior to the passing of the *Customs and Inland Revenue Act* of 1878, they were entitled under the 12th section of that Act to the deduction they claimed. But this contention the Appellants abandoned at the hearing in this House in 1879.

The case also stated that "The surveyor of taxes, Mr. *Thomas Black*, maintained that the deduction claimed is not included, either expressly or by inference, among those allowed by the Act 5 & 6 Vict. c. 35; that the cost of sinking new pits is an expenditure and investure of capital, and so cannot form a deduction from the annual profits of the concern; but, on the contrary, by the terms of the Act 5 & 6 Vict. c. 35, s. 100 (rule 3 of sched. D), it is specially disallowed as a deduction" .... "and he founded upon the case of Messrs. *Addie & Sons*, 16th Feb., 1875 (3), as an authority in his favour."

"The Appellants further stated that in the case of *Knowles and Others* v. *McAdam* (1), the High Court of Justice in *England* had allowed deductions even for the exhaustion of estate or capital by the working of minerals, and the Appellants claimed as a right that the cost of winning, of which the sinking of shafts is a part, should be allowed."

On these statements and contentions the Court of Session gave judgment (2) on the 6th of February, 1879, holding that the case thus presented to them did not in principle differ from the case of the tenant of a mineral field sinking one pit, and one only, and proceeded by means of that pit to work out the whole minerals let to him; and that the case was governed by that of *Addie* v. *The Solicitor of Inland Revenue*, Feb. 16, 1875 (3), where it was expressly decided that the capital expended in sinking pits was an expenditure of capital and cannot be taken into account in computing the profits for assessment of income tax.

Against that decision the *Coltness Iron Company*, in virtue of

(1) 3 Ex. D. 23. (2) Court of Sess. Cas. 4th Series, vol. vi. p. 617.
(3) Court of Sess. Cas. 4th Series, vol. ii. p. 431.

the power to that effect contained in the 15th section of the Act 41 Vict. c. 15, appealed to this House.

Aug. 1, 1879. The Law Peers after hearing counsel (1) "being of opinion that the statement of facts contained in the case submitted to the Court of Session on this matter is not sufficiently full to enable this House finally to dispose of the points of law on which its decision is called," remitted the cause back to the Court of Session that it might be amended under 37 & 38 Vict. c. 16, "and that an adjudication be held on such amended case and reported to this House."

In pursuance of the remit the parties petition the Court of Session to remit the case to the Commissioners, in order to the same being amended by adding thereto, in the form of schedule or otherwise, "(1.) Statement of the amount expended by the company in sinking pits, and charged to capital account from 30 June, 1858 to 30 June, 1878; (2.) Statement of pits exhausted from 30 June, 1858, to 30 June, 1878, shewing the total cost in sinking the pits, the depth of them, and the length of time they were in operation; (3.) Statement of the amount expended on pit-sinking and charged to capital account, from January, 1872 till 30 June, 1878, giving the depth of each pit; (4). List of pits exhausted from January, 1872, to 30 January, 1878, giving the depth of each pit, when the sinking of the pit commenced, when each pit was exhausted, and the cost of sinking each pit; (5.) List of pits at present working, giving the depth of each pit, when the sinking of each pit commenced, and when the output commenced, and the expense of sinking each pit; also by adding a statement as to the schedules and rules of the schedules of the Income Tax Acts on which the assessment of the duty was made on the Appellants; also by adding a statement explaining how the sum of £9027, claimed as a deduction from the assessment by the Appellants, is arrived at."

The Commissioners amended the cases by appending thereto the statements and information required.

(1) Mr. *Herschell*, Q.C., and Mr. *Benjamin*, Q.C. (with them Mr. *J. B. Balfour*), for the Appellants. The *Lord Advocate* (Rt. Hon. *W. Watson*, Q.C.), and Mr. *Badenoch Nicolson*, for the Respondent.

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The facts regarding pit-sinking, set out in the statements were, shortly as follows: (1.) For the twenty years up to 1878, the amount expended on pit-sinking was £165,825 3*s.* 6*d.* This included bores for ascertaining the existence of minerals: (2.) During the same period pits were exhausted which cost—including air pits, pumping pits, &c., £102,678 6*s.* 10*d.* (3.) From January, 1872, to January, 1878, there was expended on pit-sinking, £71,964 10*s.* 2*d.*, which included £10,337 10*s.* 9*d.* for air-pits and boring: (4.) During the same period the pits exhausted cost £44,013 13*s.* 1*d.* (5.) The cost of pits at present working cost £97,537 7*s.* 1*d.* The earliest pit dating from 1849 and the latest from 1876.

The amended case also contained this statement. The sum of £9027 claimed as a deduction from the assessment by the Appellants does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating 2*s.* a ton on iron made, and 1½*d.* a ton on coal sold during the year, it being estimated that this will properly represent the amount of capital expended on making bores and sinking pits which have become exhausted by the year's working. The cost of working bores and pit-sinking is charged in the books of the company to an account called "sunk capital account," and is written off annually by a sum computed at the respective rates above specified on the quantities of iron made and coal sold in the year, as representing the capital expended on pit-sinking exhausted by the year's working."

The amended case having come before the Court of Session, their Lordships, on the 7th of January, 1881, pronounced an interlocutor (1) by which they re-affirmed the decision of the Commissioners not to allow the deduction claimed.

On appeal,

March 21, 22. Sir *F. Herschell,* S.G., and Mr. *Benjamin,* Q.C., contended for the Appellants that what they had here was a trade which could not be carried on without a constant vanishing expenditure, and therefore if the sum claimed as a deduction was not taken into account the just profits could not be fairly arrived at.

(1) 18 Scotch Law Rep. 221.

There was no such thing as profits if your capital is being exhausted, and, therefore, until capital consumed in making the profit is replaced, taxable profits do not begin. As far as paying dividends out of profits goes, it was not sufficient to consider the amount of money you have got in, the capital must be put back before dealing with profits: *Davison* v. *Gillies*, in a note to *Dent* v. *London Tramways Company* (1); and therefore the same rule applies to income tax. The true view was, that in allotting profits for minerals you deduct as part of the cost of getting them the exhaustion of the pits, taking it either as expenditure of capital, but which capital must be deducted from the gross returns, or alternatively treating it as winning expenses. And of late years it had been the universal practice to allow shipowners to deduct year by year a sum equal to the vanishing deterioration of their vessels. The mistake of the Court below was that they confounded the two capitals—capital invested and capital spent—the latter is allowed for, and not the former.

They submitted that money expended in sinking pits which have become exhausted must be taken into account and allowed for before it is possible to arrive at the "balance of profits and gains;" and, further, that this might be done because the capital expenditure referred to in rule 3, of Sched. D, sect. 100, and in sect. 159, did not include sums so expended. *Addie's Case* (2) is in effect similar to this, but that decision, at its date, 1875, was unappealable (3).

[They relied on *Knowles* v. *McAdam* (4), where deduction for exhaustion of estate was allowed for.]

The *Lord Advocate* (Rt. Hon. *J. McLaren*, Q.C.), and the *Solicitor-General for Scotland* (Mr. *J. B. Balfour*, Q.C.), (with them Mr. *Crawford*), for the Respondent, maintained that the income tax was a tax laid on year by year, and was only applicable to the facts of the year assessed for. It is laid on the annual income, and takes no notice of what would be a fair return for the entire investment. Nor did it press equally on all—the great com-

(1) 16 Ch. D. 344, at p. 347.
(2) Court of Sess. Cas. 4th Series, vol. ii. p. 431.
(3) Power given to appeal by 41 Vict. c. 15, s. 15.
(4) 3 Ex. D. 23.

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mercial house as good as freehold, and the house that may only live a few years—for the year taxed—are treated the same. There was no distinction between sinking one pit or many, nor between sinking a pit or building a house, or otherwise expending money on improvements of land.

Before the Act of 29 Vict. c. 36, mines were assessed, &c., under Schedule A as heritable subjects, which were taxed on the annual value; that Act did not completely transfer them to Schedule D, rule 3, but only so far as applicable to rule 3 of Schedule A. Therefore we must see what the mines were returning within the statutable period. And the assessment empowered by Schedule D, rule 3, was not a charge upon net profits, but a tax upon the full amount of the "balance of the profits and gains of the business during the year," which balance is to be struck in accordance with what was allowed or disallowed in the Act; but the deduction claimed by the Appellants was a sum representing money laid out many years ago on what was clearly an expenditure or investment of capital in the Appellants' business, and therefore could not be allowed by the express terms of sect. 100, Sched. D, rule 3, and sect. 159.

In 1878 the Legislature reviewed the whole Income Tax Acts, and knew that questions for allowing deductions for depreciation of machinery, and for pit-sinking, were constantly arising, and they resolved to allow the former—Act 41 Vict. c. 15, s. 12—and not the latter. This threw a light upon the intentions of the Legislature as to deductions for pit-sinking.

If the Appellants' argument was pursued to an end, income tax ought not to be paid on the profits on the sale of coal at all, on the ground that in selling it the owner was exhausting his capital. What was very like a claim for a capital restoring fund was disallowed in *Forder* v. *Handyside* (1). In *Knowles* v. *McAdam* (2) the mines after the first year's working were worth £10,424 less than the price for which they were bought; and the claim to deduct that sum on account of exhausted capital was allowed. They submitted that that decision was entirely wrong.

Sir *F. Herschell*, S.G., in reply.

(1) 1 Ex. D. 233 at p. 236. (2) 3 Ex. D. 23

The Law Peers, having taken time to consider judgment, delivered the following opinions:—

April 7. EARL CAIRNS:—

My Lords, this is an appeal from the First Division of the Court of Session, in which the Appellants, an iron company at *Coltness*, contend that in the rating for the property and income tax they ought not to be assessed on a sum of £9027, a portion of the gross proceeds of their mines for the year ending the 5th of April, 1878. The description of this sum of £9027, upon which the Appellants contend that they should not be rated, as given in the case originally, was this: "The *Coltness Iron Company*, carrying on business at *Coltness*," "appealed against the assessment made on them under Schedule D of the Act 5 & 6 Vict. c. 35," "and subsequent Income Tax Acts referring thereto, in respect of the profits arising from their business for the year preceding (1878) in so far as the said assessment includes a sum of £9027, being the costs incurred by them in sinking new pits; and for which they maintain they were not assessable. The *Coltness Iron Company* stated, and it is the fact, that for a number of years they have carried on business as coal and iron masters, and have opened up several mineral fields, sinking new pits at their own expense from time to time as the old ones have become exhausted; and they submitted that in ascertaining the profits on which they are liable to be assessed under the said Act, there ought to be deducted from the gross annual receipts derived from their business the sums expended by them in sinking the said pits."

This and the other statements in the special case, when the appeal first came before your Lordships, were not deemed by your Lordships to be sufficiently explicit, and you remitted the case for amendment. This amendment has now been made, and I will read the statement as to this sum of £9027 in the amended case. "The sum of £9027 claimed as a deduction from the assessments by the Appellants does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating 2*s.* a ton on iron made, and 1½*d.* a ton on coal sold during the year; it being estimated that this will properly represent the

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amount of capital expended on making bores and sinking pits which has been exhausted by the year's working. The cost of making bores and sinking pits is charged in the books of the company to an account called 'Sunk Capital Account,' and is written off annually by a sum computed at the respective rates above specified on the quantities of iron made and coal sold in the year, as representing the capital expended on pit-sinking exhausted by the year's working. The working charges deducted and allowed in ascertaining the profits for assessment include the whole cost of getting and raising the minerals after the pits are sunk, and of manufacturing the metal and selling the iron and coal, and the general expenses of the concern."

It therefore now appears that the statement in the case as it originally stood is not sustained, and that the sum in question does not represent the cost of pit-sinking during the year of which the profits are taken. I am not prepared to say that under the words of 5 & 6 Vict. c. 35, a mine-owner might not in some cases be entitled to an allowance in respect of the cost of sinking a pit, by means of which pit the minerals are gotten which are the source of profit for the year in which the pit was sunk. I desire to reserve my opinion on that point until the question arises. But in the present case the question is altogether different. It is, as now explained, Can a mine-owner write off and deduct from the gross earnings of his mine in a particular year, a sum to represent that year's depreciation of all the pits in the mines, whenever sunk? I am clearly of opinion that this cannot be done. It may be proper for a trader, or for a trading company, to perform in his or their books an operation of this kind every year, in order to judge of the sum that can in that year be safely taken out of the trade and spent as trade profits. But I am clearly of opinion that the owner of a mine cannot *quâ* owner thus manipulate his accounts when the question is, under sect. 60 of the principal Act, What is the "amount of profits received" from the mine in each of the five years upon which the average is to be taken?

My Lords, I do not think this question is affected by 29 Vict. c. 36. That Act provides that mines shall be charged and assessed according to the rules prescribed by Schedule D of the principal

Act, so far as such rules are consistent with No. 3 of Schedule A. But the thing to be assessed remains the same.

Your Lordships were referred by the Appellants to a decision, viz., *Knowles* v. *McAdam*, in the Exchequer Division of the High Court of Justice in *England* (1), as an authority in their favour. Your Lordships are now sitting in appeal from the Court of Session, but even supposing that case were a Scotch authority, I am bound to say that it is a decision which does not seem to me to be capable of being supported, and which I could not advise your Lordships to follow.

I therefore move your Lordships that this appeal be dismissed with costs; but this should not include any costs of, or rendered necessary by, the remit, the occasion for which arose out of a want of accuracy in stating the case, chargeable to both parties alike.

LORD PENZANCE:—

My Lords, the argument of the Appellants was based on the interpretation which they gave to the word "profit" in the Act. And it was contended that they could not be properly said to have made any profit out of their mines until a certain portion of the cost of making the bores and sinking the pits, necessary to approach the mineral-bearing strata, were deducted.

In a general, and perhaps a strict and logical sense, I think this is true. But it is also, and equally true, I think, that the cost of the mineral strata themselves, whether they have been hired or bought, should be included in any calculation which had for its object the ascertainment of the actual profit obtained by the company out of the entire adventure,—so much for the prime cost of the mineral bed, so much for approaches to it in the shape of pits, so much for working it and getting the mineral to the surface, so much for getting the mineral to the market, and against all these the price obtained for the mineral sold—these would be the elements of a profit and loss account of an entire adventure of this nature. But is this the sense in which the word "profit" is used in the Act? I think not.

The intention of the Act, it is abundantly clear, was in Sche-

(1) 3 Ex. D. 23.

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dule A to tax "property." If a man had bought an estate, the tax was intended to be paid by him on the annual value of that estate, without reference to where he got it, or how he got it, or how much he paid for it. So if a man built a house or bought a house, he was intended to pay tax on the annual value of the house, no matter what it cost. Nor does anything turn upon the fact that the estate is a permanent and undecaying species of property, while the house is a species of property of a less durable kind; he was intended to pay tax upon it as long as it lasted.

What, then, is the case of a mine? In the Schedule A, which is the schedule applicable to "property," a "mine" is in express terms included as a species of "property," and is made the subject of a tax. The only question is, how shall the annual value of this species of property be ascertained? It is to this object that the rule No. 3 found in sect. 60 of the Act is addressed. That rule assumes the ownership of the "mine," passes by altogether the sum of money which it may have cost, either in the way of purchase or rent, and proceeds to describe the method of calculating its "annual value" to the owners thereof, and this it declares shall be the average "profit" over a period of five years, "received therefrom." The words "profits received therefrom," are here introduced to define the annual value of the thing which is to be taxed, which is the "mine," and it could not, I think, be intended that for the purpose of calculating the "annual value" of a "mine," the original cost of the "mine" itself, or any part of it, should be first deducted. On the contrary, the words "profits received therefrom," in this connection, mean, I think, the entire profit derived from the "mine," deducting the cost of working it, but not deducting the cost of making it.

I do not think the subject is elucidated, but rather confused, by the illustration brought forward in argument of the merchant or trader, who spends a sum of money or invests capital in the purchase of goods, and sells them again at an advance in price. No doubt in such a case the "profit" can only be ascertained by first deducting the original cost of the goods. If a man spends £100 in the purchase of goods and sells them for £140, his profit is not £140, but at most £40 only.

But when such a matter as that is brought under the provisions of this Act for taxation, the wide difference between it and the present case is at once apparent; for the merchant or trader is taxed in such a case not in respect of any "property" which he possesses, and of which he enjoys the fruits, but only upon the profits which he realizes annually in his trade; whereas the owner of a "mine" is taxed in respect of that "mine" as a fixed and realized "property" which belongs to him, and from which he reaps an annual benefit; and the words "annual value" or "profit received" from that "property," are introduced into the statute, not as the subject of taxation, but only as the measure of the taxation to which the "property" shall be subjected.

A pit sunk to approach the mineral underground is not unlike a road made above ground, from the pit's mouth to the highway, as a means of transporting the mineral to the market. If a man were possessed of such a mine and such a road, it would be true that as the mineral was gradually worked out, the road, and the capital sunk in making it, equally with the pit, and the capital involved in making it, would gradually be exhausted and lost; but the decaying character of the property would not make it the less subject to be taxed, according to its annual value or the profit obtained by using it, as long as the mineral lasted.

This, I think, is the principle that runs through the entire Act, and your Lordships could not, I think, sustain the present appeal without introducing principles which would entirely subvert the method of taxation which the Legislature intended, and according to which this statute has hitherto been administered.

I agree that the judgment of the Court below should be affirmed, and this appeal dismissed with costs, subject to the exception mentioned by my noble and learned friend.

LORD BLACKBURN:—

My Lords, this case was stated in order to be able to ask your Lordships to review the decision of the Court of Session in the case of *Addie* v. *Solicitor of Inland Revenue* (1), and reliance was placed on the decision of the Exchequer Division in *Knowles* v.

(1) Court of Sess. Cas. 4th Series, vol. ii. p. 431.

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McAdam (1). Both of those decisions were pronounced at a time when there was no appeal against either; and as they were, I think justly, considered inconsistent with each other, it is important that both should be brought under review.

The *Coltness Company* appealed against the assessment for the year 1878, in so far as the assessment includes a sum of £9027, being the cost incurred by them in sinking new pits. It was thought that the statement of facts contained in the case was not sufficiently full to enable this House finally to dispose of the points of law on which its decision was asked, and it was directed that it should be amended, which was done. And the result shews that this was requisite; for the amended case, besides entering into various details as to the mode of pit-sinking and working the mines in the Appellants' mineral field, contains a statement as to what the £9027 consisted of, which I think could not have been collected from the statements in the original case.

I think it is not necessary to inquire what other points might possibly have been raised on the other facts, still less to decide them, if that statement shews that the sum of £9027 is not properly to be deducted from the assessment. I will read that statement. The sum of £9027 claimed as a deduction from the assessment by the Appellants does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating 2*s.* a ton on iron made, and 1½*d.* a ton on coal sold during the year; it being estimated that this will properly represent the amount of capital expended on making bores and sinking pits which has been exhausted by the year's working. The cost of making bores and sinking pits is charged in the books of the company to an account called "sunk capital account," and is written off annually by a sum computed at the respective rates above specified, on the quantities of iron made and coal sold in the year, as representing the capital expended on pit-sinking, exhausted by the year's working. The working charges deducted and allowed in ascertaining the profits for assessment include the whole cost of getting and raising the minerals, after the pits are sunk, and of manufacturing the metal and selling the iron and coal, and the general expenses of the concern.

(1) 3 Ex. D. 23.

The phrase "capital exhausted" does not occur anywhere in the Income Tax Acts. It is taken from a passage in Mr. *McCulloch* on Political Economy, where he says:

> Profits must not be confounded with the produce of industry primarily received by the capitalist. They really consist of the produce on its value remaining to those who employ their capital in an industrial undertaking after all their necessary payments have been deducted, and after the capital wasted and used in the undertaking has been replaced. If the produce derived from an undertaking after defraying the necessary outlay, be insufficient to replace the capital exhausted, a loss has been incurred; if the capital is merely sufficient to replace the capital exhausted, there is no surplus, there is no loss, but there is no annual profit, and the greater the surplus is, the greater the profit.

I do not feel at all inclined to dispute the sufficiency of this definition. I think that if a building society had taken a building lease, and it became necessary at any time to ascertain what profit or loss had been made by it from that lease, all the money expended in building houses would be placed on one side of the account, and on the other all that had been received for houses let or sold, and the value during the residue of the building lease of the houses then remaining in the society's hands, and that value would of course be less and less as the lease drew nearer to an end; and if in the first year of the building lease a house was built at a cost of, say, £10,000, and the profit or loss on the lease had to be estimated when the residue of the building lease was reduced to, say, five years, and the lease of the house for those five years would sell for only, say, £5000, I do not think it inaccurate to say that in computing the profit or loss on the building lease, £5000 would be allowed as capital invested in building that house and now exhausted. But that is certainly not the scheme of the income tax as far as regards building leases and other properties comprised in Schedule A, No. 1. The tax is imposed on the annual value of the block of buildings, which is to be taken at the rack-rent at which the same are worth to let for the year. By no process of reasoning, could that rack-rent be made to depend on the sum which had been expended in building the houses, or to be greater or less according as the building lease was longer or shorter. Mines are not comprised in Schedule A, No. 1, but in Schedule A, No. 3, and the tax is imposed on them by a different set of words certainly. And if the decision in

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Knowles v. *McAdam* (1) is correct, it is imposed on a radically different principle. I have felt myself constrained to advise your Lordships to say that the case of *Knowles* v. *McAdam* (1) was wrongly decided.

I think the question thus raised can hardly be decided without examining at some, I fear tedious, length the enactments on the construction of which it depends. No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him. But when that intention is sufficiently shewn it is, I think, vain to speculate on what would be the fairest and most equitable mode of levying that tax. The object of those framing a Taxing Act is to grant to Her Majesty a revenue; no doubt they would prefer, if it were possible, to raise that revenue equally from all, and, as that cannot be done, to raise it from those on whom the tax falls with as little trouble and annoyance and as equally as can be contrived; and when any enactments for the purpose can bear two interpretations, it is reasonable to put that construction on them which will produce these effects. But the object is to grant a revenue at all events, even though a possible nearer approximation to equality may be sacrificed in order more easily and certainly to raise that revenue, and I think the only safe rule is to look at the words of the enactments and see what is the intention expressed by those words.

Before, however, proceeding to examine the words of the Income Tax Acts, on which, in my opinion, everything depends, I wish to point out that, long before any income or property tax was imposed for general revenue, the parochial authorities in *England* raised a revenue for parochial purposes, which was very much in the nature of an income and property tax. And the language used in the Income Tax Acts is such as to convince me that the Legislature had in their contemplation what had been done in this branch of the law, which, if not exactly *in pari materiâ*, is at least an analogous subject. I think it more convenient to state briefly what was the state of the law as to rating real property in general, and (though, by a very narrow construction, the specific mention of coal mines was held to exclude all other mines) of coal mines, quarries, &c., in particular.

(1) 3 Ex. D. 23.

By the statute of 43 Eliz. c. 2, the churchwardens and overseers of the parish were empowered to raise, "by taxation of every inhabitant, parson, vicar, and others, and of every occupier of lands, houses, tithes impropriate or propriations of tithes, coal mines, or saleable underwoods in the said parish," a sufficient sum. The power to rate the inhabitants as such was put an end to by a temporary Act, 3 & 4 Vict. c. 89, continued from year to year, and finally made perpetual by 37 & 38 Vict. c. 96. The power to tax the occupiers of the species of property named in the Act of *Elizabeth* continued.

In 1827 (*King* v. *Attwood* (1)) a case was stated for the Court of King's Bench as to the principle of rating coal mines. Chief Justice *Abbott* delivered a judgment which is so germane to the subject we are now considering that I will read the whole of it, as it is not long:

> We are all of opinion that the owner and occupier of a coal mine should be rated at such a sum as it would let for, and no more. As to the other points, the first was that the rate should not be imposed upon the coal produced, because that was part of the realty. It is the first time that such a proposition has ever been submitted, although many coal mines in various parts of the country have constantly been rated, and the argument in support of it is wholly untenable. The Legislature has expressly made coal mines rateable, and they must be rated for what they produce, viz., the coals. Slate quarries and brick earth are also exhausted in a few years, but nevertheless the rate is always imposed on that which is produced. The other argument was, that the rate could not be imposed until the expense of planting the mine had been recouped. But I cannot discover any distinction between expenses incurred in bringing a mine to a productive state and in building a house. The attempt to distinguish them is perfectly novel, and if a house is to be rated as soon as it is built and occupied, it must follow that a coal mine is rateable as soon as it is set to work and produces coal, although it may happen that the expense of sinking it may never be recovered. If the tenant of a mine expends money in making it more productive, that is the same as expending money in improving a farm or a house, in which cases the tenant is rateable for the improved value.

I do not say that what Lord *Tenterden* here lays down as to the taxation of a coal mine is necessarily either just or expedient; but though this case was decided before the earlier Income Tax Acts, it was an authoritative declaration of what had been held to be law before, and must have been well known to that large proportion of the legislators who habitually acted at quarter sessions.

(1) 6 B. & C. 277.

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The Legislature in 1836, by 6 & 7 Will. 4, c. 96, enacted that all poor-rates shall be made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent tax, if any, and deducting therefrom the probable average annual cost of the repairs, assurance, and other expenses, if any, necessary to maintain them in a state to command such rent." And in the form of the rate prescribed there is to be in one column a statement of the "gross estimated rental," and in another of the "rateable value."

The Act 5 & 6 Vict. c. 35, adopts without any variations which affect this question, the language of the former *Income Tax Act*, 46 Geo. 3, c. 65. Before that there had been an earlier *Income Tax Act*, 43 Geo. 3, c. 122, from which there are changes, and I think some of those changes throw light on what was the intention of the Legislature in the substituted enactments. The first *Income Tax Act*, 43 Geo. 3, c. 122, s. 31, comprised in Sched. A all lands, tenements, hereditaments or heritages, and enacted that for them there shall be charged throughout *Great Britain* in respect of the property thereof, for every 20*s.* of the annual value thereof the sum of 1*s.*; and enacted that "the said duty shall be construed to extend to all manors and messuages, to all quarries of stone, slate, limestone, or chalk; mines of coal, tin, lead, copper, mundic, iron, and other mines; to all iron mills, furnaces and other iron works, and other mills and engines of the like nature; to all salt springs or salt works," and many more things.

The Legislature here classed together in one schedule, properties, such as agricultural land, which from their nature will continue permanently to exist; and properties, such as quarries, which will certainly come to an end within a period longer or shorter, but the duration of which can be generally calculated; and properties, such as ironworks, which are real property, deriving their annual value from being ancillary to trade. It imposed one tax at one rate upon them all, and gave one general rule that the annual value should be understood to be the rack-rent; and it directed that the tax should be paid by the occupier, who might deduct a proportionate part from his rent. And by No. III.

there is allowed a deduction for repairs not exceeding 5 per cent. on the annual value of a dwelling-house, or 2 per cent. on the annual value of a farm. But there is not, expressly at least, any allowance made for repairs in respect of other kinds of real property. And by Schedule B there is imposed, in addition, a tax on the occupier of all such properties (with some exceptions not material to be noticed), and the first of the rules for estimating the annual value of properties before described in Schedules A and B in *England* is that no such property shall be charged at less than the last poor-rate, which shews that those who framed that Act were thinking of the analogous case of the parochial taxation for the relief of the poor.

The statute 43 Geo. 3, c. 122, also, by sect. 84, imposes a duty, by Schedule D, upon the annual profits, *inter alia*, of every trade, and by the rules therein the duty shall be computed upon a sum not less than the full amount of the profits upon a fair and just average of three years without any other deduction than is hereafter allowed; and the third rule is, no deductions shall be made on account of any sums expended on repairs of premises occupied for the purposes of such trade, nor for any sum expended for the supply or repairs, or alteration of any utensils or articles employed for the purpose of such trade, beyond the sum usually expended for such purpose according to the average of three years. I conjecture that during the three years that elapsed between the passing of 43 Geo. 3, c. 122, and the passing of 46 Geo. 3, c. 65, experience had shewn that there were difficulties in working this scheme, and that claims for deductions had been made; for whilst most of the provisions of the first Act were re-enacted, those to which I have above referred were all materially altered. It is not necessary to go through 46 Geo. 3, c. 65; for the provisions of that Act are re-enacted in 5 & 6 Vict. c. 35, without any alteration which seems to me material to notice.

The third rule as to Schedule D, which I have above quoted, still continued to be negative in its form, that no deductions should be made under several enumerated pretences, but the number of these was considerably increased, and—why I do not know—instead of saying that the duty should be imposed on a fair and just average of the amount of the profits for three years, it is

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imposed "on the balance" of such profits. I have not been able to discover any difference in the meaning of the two phrases.

The several rates and duties granted by 5 & 6 Vict. c. 35, are imposed by sect. 1, Schedule A, for all lands, tenements, hereditaments, or heritages in *Great Britain* which shall be charged yearly, "for every 20s. of the annual value thereof, the sum of sevenpence." Then, by sect. 60, the properties chargeable under Schedule A, instead of being, as in statute 43 Geo. 3, c. 122, treated together in one schedule, are treated of under numbers. By No. 1 (which gives the general rule, which is the same as that which in 43 Geo. 3, c. 122, was applied to all in Schedule A), the annual value shall be "understood to be the rent by the year at which the same are let at rack-rent, if they have been let at rack-rent within seven years before the assessment; but if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year." And by sect. 63, in addition to the duties to be charged under Schedule A, there shall be levied the duty under Schedule B on all properties to be charged according to the general rule in No. 1, with some exceptions not material to this case.

The rules, which expressly gave a power to allow for repairs a sum not exceeding a certain percentage on the annual value of houses and farms, are not re-enacted. Nor are the rules above quoted, which refer to the poor-rate in *England* as being the test of annual value. It is not material in this case to inquire whether the rack-rent mentioned is to be measured by what, in statute 6 & 7 Will. 4, c. 96, is called the gross estimated rental, without making any allowance for those annual repairs which the tenant would certainly take into consideration when bidding that rent. It could not have been intended that the rack-rent should be less than the rateable value.

No. 2 and No. 3 comprise properties which are comprised in the general description in Schedule A, but which it was not thought expedient to include in Schedule B, though in the first *Income Tax Act* they had been so included. One would anticipate that the duty imposed on those would be on the rack-rent which they would have been worth to let by the year, and something more in lieu of the duty imposed by Schedule B. And as the duty imposed

by the poor law and the duty imposed by the first *Income Tax Act* was precisely the same on properties like quarries, which are terminable, and properties which are permanent, one would expect that no distinction would now be made. Whether that is so or not must depend on the true construction of the words used, which, with reference to No. 3, are these: "The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited," that is, of quarries, &c., and what may be called miscellaneous properties, one year; of mines, &c., five years. No definition is given of profits for one year. That is left to be ascertained as a matter on the construction of the Act. The rules which are contained in sects. 60, 61, 62, and 64 relate to many things—as to the place where the duties shall be assessed, and the persons by whom they are to be assessed, and also as to many allowances to be made; but I can find nothing in them to throw any light on the construction of the words, "the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited," that is, in some cases one year, and in some five.

It may be convenient here to notice two arguments not, I think, relied on by the Solicitor-General in his argument at your Lordships' Bar, though he had used them before the Exchequer Division in *Knowles* v. *McAdam* (1). It was said by Lord *Cairns* in *Gowan* v. *Christie* (2), that a lease of mines "is not in reality a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no sowing and reaping in the ordinary sense of the term, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land." I think this is a perfectly accurate statement. But the argument that no income tax should be imposed on what is, perhaps not quite accurately, called rent reserved on a mineral lease, because it is a payment by instalments of the price of minerals forming part of the land, any more than on the price paid down in one sum for the out and out purchase of the minerals forming part of the land, is, I think,

(1) 3 Ex. D. 23. (2) Law Rep. 2 H. L., Sc. at p. 284.

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untenable. Even if it had not been, as decided in *The King* v. *Attwood* (1), the constant course from the *Statute of Elizabeth* downwards to construe an annual tax imposed on coal mines, quarries, and the like, as being imposed on that which is produced from them, I should say that no other construction could be placed on the 60th section of 4 & 5 Vict. c. 35; especially after seeing in what manner the Legislature, in 43 Geo. 3, c. 122, had dealt with them; though I think that the judgment of the Exchequer Division in *Knowles* v. *McAdam* (2) seems an authority to the contrary. From that judgment, however, to which I shall afterwards return, I must ask your Lordships to dissent.

It has also been sometimes argued that it is very unjust to tax at the same rate a terminable interest, such as that in a mine, which must at some time be worked out, and a fee simple interest, which will endure so long as this world continues in its present state. I will not inquire whether this is just or not. There is much force in the argument on the other side, that if the interest is terminable, so is the tax, and will cease when the interest ceases. But whether just or not, there can be no doubt that the same annual charge is imposed upon a terminable annuity and on one in perpetuity; and, what seems harder, that the same annual charge is imposed upon a professional income, earned by hard labour, often extending over many years before any return is got, and, when earned, precarious, as depending on the health of the earner.

In 5 & 6 Vict. c. 35, the different schedules were kept apart and complete in themselves, but I think wherever there was any provision in any one of the schedules that throws light on what is meant by annual value, or annual profits, or capital, it may be very material in construing the meaning of those words used in other parts of the Act. Thus I think that the provision under the fifth head of No. 2, that an allowance may be made from the amount to be taxed on fines, "if it be proved that such fines, or any part thereof, have been applied as productive capital, on which a profit has arisen or will arise, otherwise chargeable under this Act for the year in which the assessment shall be made," and the provision in Schedule D, that "no deduction shall

(1) 6 B. & C. 277. (2) 3 Ex. D. 23.

be made on account of any sum employed or intended to be employed as capital," neither of which was in 43 Geo. 3, c. 122, throw some light on each other, and may fairly be referred to in inquiring what is meant by "the average amount for one year of the profits received within the time limited." But Schedules A and B were complete in themselves, and Schedule D, which was regulated by sect. 100, was complete in itself. The duties were, however, assessed by different commissioners, and in different places. By 29 Vict. c. 36, s. 8: "The several and respective concerns described in No. III. of Schedule A of" "5 & 6 Vict. c. 35 shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Schedule D of the said Act, so far as such rules are consistent with the said No. III. Provided that the annual value or profit and gains arising from any railway shall be charged and assessed by the commissioners for special purposes."

In *Knowles* v. *McAdam* (1), Chief Baron *Kelly* says, "It is quite clear that sect. 8 of 29 Vict. c. 36, transfers the present case" (that of a coal mine) "from Schedule A to Schedule D," and the judgments of the Barons in that case seem to me to depend a good deal on this, as it seems to me, erroneous assumption. I think that the duties are to be assessed according to the rules in Schedule D, and consequently all the anxiously-devised provisions for keeping the returns under Schedule D secret and confidential, to be found from sect. 100 to sect. 131, are made in future to apply to returns for the concerns described in No. III. of Schedule A, and any rule expressed as to the mode of computing the balance of the profits and gains during the period of three years given in Schedule D which is not inconsistent with No. III., may, perhaps be made in future to apply to the mode of computing the annual profits of properties chargeable under No. III. And I see that in *Addie* v. *Solicitor of Inland Revenue* (2) reliance is placed in the judgment of the Lord President on the 3rd rule as to concerns under the first case of Schedule D, that no deduction is to be made "for any sum employed, or intended to be employed, as capital." But I do not think reliance can be placed on this. If, from the nature of the concerns in No. III. an allowance ought to

(1) 3 Ex. D. 23. (2) Court of Sess. Cas. 4th Series, vol. ii. p. 431.

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be made for capital, then this rule should be rejected as inconsistent with No. III. If no such allowance should be made, the rule is not required.

In *Forder* v. *Handyside* (1) the Exchequer Division came to a decision as to repairs, estimated but not actually incurred, which, whether it was right or wrong, is no longer, since 41 Vict. c. 15, s. 12, to apply. And as there is no question in the case at bar as to repairs, it is unnecessary to inquire whether it was right or wrong.

If the effect of sect. 8 of 29 Vict. c. 36, was to transfer cases in Schedule A No. III. to Schedule D, it would change the respective times on an average for which the profits were to be assessed. Mines would be reduced from a five-year period to a three-year period. Quarries and things of that sort would be raised from a single year to three. I cannot think this was either intended or expressed. But, on the assumption that it had this effect, the Exchequer Division came, in *Knowles* v. *McAdam* (2), to a very startling decision. In that case a company had bought for a very large sum the minerals in beneficial leaseholds of coal mines, having an average of thirty-two years to run, and in freeholds. The decision of the Exchequer Division was that the effect of transferring the mines, as they thought, from Schedule A to Schedule D, was to cause the company to be assessed as persons carrying on the trade of vendors of coal, who had bought wholesale a large quantity of coal, not stored in warehouses but in the earth, and which they were going to sell in the course of their trade; and that they ought to be assessed on the principle of valuing the stock-in-trade, that is, the coals thus stored in the earth, at the beginning of the three years, and again valuing the stock at the end of the three years; and taking the difference between them as being to be added to or deducted from the net receipts during that period in estimating the profits for the three years. The effect of this would be that though the mines were worked so as to produce a large profit above the working expenses, yet if they were worked by a purchaser who had overestimated the value of the minerals, and paid such a price for them that he was a loser, no income tax was to be paid in respect

(1) 1 Ex. D. 233. (2) 3 Ex. D. 23.

of those mines. That is a result which never could have been intended by the Legislature, and if it follows by legitimate reasoning from the interpretation put upon 29 Vict. c. 36, s. 8, it seems to me a *reductio ad absurdum*, shewing that the interpretation was wrong.

I therefore advise your Lordships to hold that the decision in *Knowles* v. *McAdam* (1) was erroneous. I do not wish to lay down any general proposition, either that money expended in sinking pits can never be in the nature of expenses incurred within the five years in working the coal, so as to be properly taken into account in estimating the profits made in that period; or to say what, if any, the circumstances are under which it may be done. That, I think, had better be left to be determined when the case arises. I think it enough to say that this sum of £9027, described in the case, is not such as ought to be deducted.

The result is that, in my opinion, the interlocutor below should be affirmed, and the appeal dismissed with costs, with the modification proposed by the noble and learned Earl.

Interlocutor appealed from affirmed; and appeal dismissed with costs; except the costs incurred by reason of the remit.

Lords' Journals, 7th April, 1881.

Agents for Appellants: *Grahames, Wardlaw & Currey.*
Agent for Respondent: *W. H. Melvill, Solicitor of Inland Revenue.*

(1) 3 Ex. D. 23.

[HOUSE OF LORDS.]

H. L. (Sc.) SINCLAIR . . . . . APPELLANT;

1881 CAITHNESS FLAGSTONE QUARRYING COMPANY . . . . . } RESPONDENTS.

April 7.

Agreement, Construction of.

Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works, to run, *inter alia*, "by the end of the policy" of the landlord: and they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed, *inter alia*, to give gratuitously the land required for the tramway. Outside the policy ground there was a private road the property of the landlord, which, before it reached the tenant's works, ran through another tenant's stone pavement yard. This was the only practical route outside the policy for the tramway; and it was alleged that the only obstacle to laying it along that road was that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there were no *termini habiles*.

The tenants claimed that the landlord was bound to give them the use and possession of land for the purpose of the tramway, and that, either (1) "within and by the end of the policy," or (2) "in any other place as suitable and convenient for them in every respect":—

Held, reversing the decision of the Court below, that under the agreement the stipulation was that the tramway should pass outside the walls which enclose the policy of the landlord; and that by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them (with the power to use his name) to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway.

Holograph Writing—Agreement between Tenant and Landlord, written from the latter's Dictation.

A landlord entered into an agreement with a tenant, the terms of which were dictated by the landlord to a person who acted as his factor. The agreement was then handed unsigned to the tenant, who was present. The factor's name did not appear in the agreement, nor had he any authority to

make the agreement for the landlord. Subsequently the tenant resiled from the agreement:—

Held, affirming the decision of the Court below, that the writing was not a valid holograph writ, and therefore the tenant could resile from it.

Lord *Watson* doubted whether the document would be valid even if the factor had been the sole negotiator acting in the landlord's absence and by his instructions.

APPEAL against an interlocutor pronounced by the First Division of the Court of Session (1), *Scotland*, in an action in which the Appellant, Sir *John George Tollemache Sinclair*, was Defender, and the Respondents, the *Caithness Flagstone Quarrying Company*, were Pursuers. The Appellant is proprietor of the *Ulbster* estates in *Caithness*, and the Respondents are lessees of the pavement quarries of *Weydale* and *Heathfield*, and others, and also of pavement yards and buildings at *Thurso East*, all lying in the parish of *Thurso* and county of *Caithness*, on the *Ulbster* estates, under a lease from the Appellant for twenty-one years from 1874.

On the 15th of August, 1879, the Respondents raised the action by a summons in which they asked that the Appellant ought to be ordained to fulfil his part of an agreement entered into between him and the Respondents, dated the 21st of February, 1878; and in particular by giving them the use and possession of land for the completion of a tramway from their quarries to their yard, either (1) "within and by the end of the policy of *Thurso Castle*," or (2) "in any other place as suitable and convenient for the" Respondents in every respect.

The facts of the case and the findings of the Court below are very fully given in the opinion of Lord *Watson* (*post*, p. 352).

On appeal,

Sir *F. Herschell*, S.G., and Mr. *Webster*, Q.C., were heard for the Appellant.

[They cited *Scottish Lands and Buildings Company* v. *Shaw*—holograph writing (2); *Dickson* on Evidence, sect. 751.]

Mr. *Benjamin*, Q.C., and Mr. *Asher*, were heard for the Respon-

(1) Court Sess. Cas. 4th Series, vol. vii. p. 1117.
(2) Ibid. p. 756.

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dents; but were relieved by the House from arguing the question whether the writing dated the 28th of September, 1878, was a valid holograph writ.

LORD SELBORNE, L.C.:—

My Lords, it is impossible to regard the litigation in this case without feelings of regret, and I am satisfied that your Lordships ought not, on technical grounds, to abstain now from dealing with it in the way which may appear to you best calculated to put an end to it, by doing substantial justice between the parties. The Respondents, who were Pursuers in the action, are lessees under the Appellant of (what appear to be) valuable and important quarry works, and they have made an expenditure, which must be considerable, in part performance of the agreement out of which the litigation has arisen. The alternative conclusion of their summons, and their first plea in law, are wide enough to enable your Lordships to give them whatever they really ought to have, although they may be wrong in that particular view of their rights for which they have contended, and which they have presented, as if it were the only possible view, in their condescendence. If the form of the allegations in the 5th and 6th articles of the condescendence had been regarded in the Inner House as narrowing and limiting the summons, so as to disable the Court from giving effect to the alternative conclusion, except in a sense which practically nullifies it (and which, having regard to the words "in any other place," and "under and subject to the terms of said agreement," I do not myself think it will fairly bear), I have no doubt that a formal amendment of the record, under the Act of 1868, ought to have been, and would have been, allowed. The parties had gone into evidence on the whole matter, with reference to every possible view of the effect of the agreement, and the proper mode of performing it. The addition of a few words to the Pursuers' statements would have removed all technical objection, without rendering any further evidence really necessary. There is no trace of any such technical objection having been taken before the Inner House; the case was there dealt with on grounds of substance, not of form. My opinion is that your Lordships ought also so to deal with it, in accordance with what I have

always understood to be a principle acted upon here, that objections of a merely formal kind, which do not appear to have been insisted upon, and which would have been remediable, in the Court below, ought not to prevail upon appeal.

Upon the merits, both parties have contended for more than they were justly entitled to. The contention of the Defender (Appellant here), that the agreement of the 21st of February, 1878, was altered by the unsigned proposal of the 28th of September, 1878, and Mr. *Gunn's* letter of the 21st of October following, is untenable in law, that proposal not being holograph of the Defender, in whose name it throughout speaks, and Mr. *Logan* (whose holograph it is) not having written it under any authority then entrusted to him by the Defender to negotiate an agreement on his behalf. But I think it is only just to say, that the blame of the subsequent failure to settle the dispute upon the terms of that proposal does not appear to me to rest exclusively with either party; and, as the costs of the litigation have not been either caused, or substantially increased, by the Appellant's contention on this point, I think the case may properly be dealt with, both as to costs and otherwise, without any further reference to it.

Upon the construction of the agreement of the 21st of February, 1878, I think that the Respondents are wrong.

The material facts, with reference to which that agreement ought to be construed, are the following: The Respondents are lessees from the Appellant, Sir *Tollemache Sinclair*, for the residue of a term of twenty-one years, commencing at Martinmas, 1874, of the *Weydale* and other quarries, and of a piece of ground, with buildings thereon, occupied and used by them for the purpose of their pavement works, at *Thurso East*. Their quarries are at a considerable distance to the south from these pavement works. The whole of the land between the quarries and the end of the policy or home grounds of *Thurso Castle*, where the Appellant resides, belongs to the Appellant, being in the occupation of his agricultural tenants, who were bound by their contracts to give up to him, for a suitable compensation, such part of the lands occupied by them as he might require for roads. These lands are separated from the castle policy by the public turnpike road leading from *Thurso* to *Wick*, and the policy itself runs down to a

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sharp angle, point, or end, to the south-west, abutting upon this public road. The agricultural land, already mentioned, lies on the other side, to the south. The soil of the turnpike road is vested in the Appellant, subject to the rights of the public, and to the powers of the road trustees. The policy is bounded westward by a park wall, on the western side of which there is an occupation road, diverging from the turnpike road at the exact point where the policy ends, and proceeding thence northwards. This occupation road is itself bounded to the west, for some distance from its junction with the turnpike road, by a public park, not the property of the Appellant; and afterwards, for some distance further, by the shore of the *Thurso* estuary, which does belong to the Appellant. Along this it continues to run, close to and in a line with the policy wall, until it reaches a parcel of land, lying between the policy and the estuary, which is also a part of the Appellant's estate, but is leased by him as a pavement yard to another company, called "*The Co-operative Pavement Manufacturing Company* at *Thurso*," for a term of eleven years, commencing at Whitsuntide, 1872. The same occupation road is continued northward, through this parcel of land, until it passes into the Respondents' pavement works at *Thurso East*, where it terminates. The soil of this occupation road belongs throughout to the Appellant. The co-operative company are bound, by their contract with him, to keep it, where it passes through their pavement yard, free from obstructions, "so as to admit of full and free access to and from *Thurso East*, at all times during the currency of their lease." The Respondents are, by the terms of their lease, entitled to use it; and they are bound to bear two-thirds of the expense of keeping it in repair, through the whole of its course from the turnpike road to *Thurso East*, the other third being borne by the Appellant. They have, in fact, been in the habit of carrying along it, in waggons and trucks, all the stone brought from their quarries to their pavement works; and it appears from the evidence that in or about 1870 there was a "stone tramway" laid down upon it, which "continued to be used till the stones got so much worn that they became useless." Whether the *solum* of this road, where it passes through the yard of the co-operative company, is included in that company's lease,

is not, upon the evidence, clear; but the more probable inference from that evidence seems to me to be that it is not.

The distance northwards, from the southern angle, point, or end of the castle policy, to the nearest part of the Respondents' pavement works at *Thurso East*, is more than one third of the whole extent of the policy grounds, measured in a straight line from south-west to north-east.

It appears, from the evidence of the witnesses for the Appellant, that there would be no practical difficulty in carrying a tramway or railway (in continuation of that already made by the Respondents from the *Weydale* quarry, under the agreement of the 21st of February, 1878, to a point near, and a little to the south-west of, the end or southern angle of the castle policy), along the occupation road, without interfering with any use of it, for access or egress to or from their pavement yard, to which the co-operative company may be entitled. It is stated to be about twenty-five feet in breadth in its narrowest part, and, at its widest, twenty-nine feet, of which (according to the evidence of the witness *Belfrage*, which I see no reason to disbelieve) ten feet only would be required for the width of the tramway and the trucks passing along it; seventeen feet of roadway remaining available, at the same time, for other traffic.

The agreement, which your Lordships have to construe with reference to this state of facts, provided that the Respondents should "construct a tramway or railway from the *Old Weydale Quarry*, by the *Moss of Weydale*, thence near *Stainland House*, near *Oldfield House*, and by the end of the policy of *Thurso Castle*, to their works at *Thurso East*." The *Moss of Weydale*, *Stainland House*, and *Oldfield House* were all in that part of the Appellant's estate, which was let to his agricultural tenants, to the south of the turnpike road. Neither the turnpike road nor the occupation road is mentioned in the agreement; but the former must necessarily be crossed by the intended tramway or railway. The Respondents further agreed "to compensate the tenants along the line for any damage done to their farms during the currency of their leases." The Appellant agreed "to give gratuitously the land required for said tramway or railway." There were also stipulations, which need not be stated in detail, as to a contribu-

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tion by the Appellant towards the maintenance of the road, when made; as to payment of one-half of the value of the tramway by the Appellant to the Respondents, in the event of his letting the *Weydale* quarries to any other person, or taking them into his own hands, at the end of the Respondents' term; and as to a right given to the Respondents to sell the materials of the tramway in certain other events. The agreement concluded with these words:—"The direction of the line to be adjusted between Mr. *Logan* and the company,"—Mr. *Logan* being the Appellant's man of business.

The principal contest has been upon the meaning of the words "by the end of the policy of *Thurso Castle*;" the Respondents insisting that, as the Appellant was "to give gratuitously" all the land required for the tramway, and as the tramway was to be carried as far as the Respondents' works at *Thurso East*, it must be carried up to those works from the turnpike road through the policy itself, where no other rights or claims of right than those of the Appellant could possibly come in question. This would have involved a passage, not through any small corner of the policy which could reasonably be described as its "end," but through more than one-third of its entire length; and it appears to me that a construction which could have such an effect would do extreme violence to the natural meaning of the words. If those words had been "by the policy" they might possibly have meant *by way of* the policy; as "by the *Moss of Weydale*" meant by way of, or through, the Moss. But "by the end" naturally means that the tramway was to pass by, and to be carried on the outside of, that angle or point, in which (as has been stated) the policy ends. It cannot have been intended to exclude from the line of the tramway everything in the nature of an existing roadway over which other persons besides the Appellant and the Respondents might have some rights of passage or traffic; because it was, at all events, absolutely necessary that the tramway should, at some point, cross the turnpike road. If, at that point, the agreement on the Appellant's part might be performed by giving gratuitously to the Respondents all his right to that part of the *solum* of the turnpike road, leaving them to make their own terms with the turnpike trustees, still more might it be performed by giving up

to them, for the like purpose, as much as might be necessary of the *solum* of the occupation road, or of the seashore in which, subject to their own right of way, and to the rights (whatever they might be) of the co-operative company, the Appellant had the absolute property. If, indeed, there had been no land belonging to the Appellant which he could gratuitously give to the Respondents, westward of the policy wall; if it had been apparent, from the facts, that the parties could not have had in their contemplation any mode of carrying the tramway from the turnpike road to the Respondents' pavement works, except through the policy; it might then have been necessary to interpret the words, "by the end of the policy," in a sense different from their natural and *primâ facie* construction; but the facts being such as they actually are, and having been within the knowledge of both parties at the date of the agreement, I think the natural construction of those words must prevail. There was no legal or other impediment to the construction of the tramway along the course of the occupation road (whether with or without any deviation where the road skirts the seashore) up to the point where the occupation road enters the pavement yard of the co-operative company; and I think it probable, upon the evidence (though in the absence of the co-operative company it cannot be so decided), that the tramway might lawfully be carried, by the concurrence of the Appellant and the Respondents, along the course of the same road, through the co-operative company's yard. Supposing, however, that it might be necessary for the Respondents during the residue of the co-operative company's lease, to obtain the consent of, or make some terms with, that company (as they would be obliged to do with the turnpike trustees), I think they must be regarded as having entered into the agreement with sufficient knowledge of that possible liability, and without any engagement on the part of the Appellant either to indemnify them from it or (if any difficulty should arise out of it) to let them carry the tramway through the Castle policy. I do not think that the possibility of such a difficulty arising could constitute a reason for interpreting the words "by the end of the policy" in any other than their natural sense. What happened afterwards cannot be

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used in aid of the construction of those words. It is, however, satisfactory to know that the position in which the Respondents will be placed by holding them to the natural construction of the agreement is not different (so far as the passage through the yard of the co-operative company is concerned) from that in which they would have been placed by the arrangement to which they, through Mr. *Gunn*, were willing to consent on the 21st of October, 1878, if that arrangement had been carried into effect. By the proposal, of which Mr. *Gunn* then signed his acceptance, they would have acquired a right to carry the tramway along a narrow strip of land now lying within the policy wall (which was to have been taken down and rebuilt on the east side of the tramway), up to the point where the occupation road enters the yard of the co-operative company, but no further. It would have been just as necessary under that proposal as under the agreement of the 21st of February, to continue the tramway along the course of the occupation road through the co-operative company's yard in order to reach its intended terminus in the Respondents' works at *Thurso East*.

Taking this view of the rights of the parties, it appears to me that the declarations contained in the interlocutor of the First Division, now appealed from, are less favourable than they ought to have been to the Appellant; and that the Appellant ought not to have been required to state in a minute in what line he proposes that the portion of the tramway therein mentioned shall be formed, and what ground he proposes to furnish for that purpose. I think, therefore, that the interlocutor appealed from ought to be reversed, except so far as it recalls the interlocutor of the Lord Ordinary. I have had an opportunity of seeing the terms of the order, which one of my noble and learned friends, who is peculiarly conversant with the administration of justice in *Scotland*, proposes to substitute for it; and, agreeing as I do with the form of order which he suggests, I recommend to your Lordships that it should be adopted. I am also quite content that the costs of that appeal, and below, should be disposed of (as my noble and learned friend proposes) by giving them to the Appellant, who has succeeded upon the substantial question raised in the Respondents' condescendence.

LORD BLACKBURN:—

My Lords, this cause comes before your Lordships in a manner which has given me some anxiety. My difficulty has principally been that I doubted whether it was competent, on this state of the proof, to decide a question which has not yet arisen, and may probably never arise, namely, what were the obligations which, by the agreement of the 21st of February, 1878, the Defender took upon himself, in case the co-operative society should raise an objection to the tramway being laid along the private road running through their yard. It was for some time supposed by both parties that they were bound by the substituted agreement of September-October, 1878. I agree with and need not repeat the reasons for saying that this substituted agreement was one from which either of the parties could resile, and when either did so resile the parties were remitted to their rights under the agreement of February, 1878, that agreement having been so acted upon that neither party could resile from it.

But for some months both parties were under the belief that they were bound by this substituted agreement. According to it the line was to run along the west end of the policy, and then across the co-operative company's yard above the road. The co-operative society were under no obligation to assent to this line crossing what was unquestionably their yard, and it appears from a document, No. 102 of process, that they asked for an apparently unreasonable concession as the consideration of their assent. Whether they would have persevered in this demand we cannot tell, for the Pursuers were dissatisfied with the agreement of September-October on other grounds, and being advised, and rightly advised, that they could (in point of law) resile from that agreement, they did so; and then the parties were remitted to their rights under the agreement of the 21st of February.

The co-operative society never were asked if they had any objection to rails being laid on the private road, and consequently never objected to it. And it by no means follows that because they asked for an unreasonable concession in return for their assent when they had a clear right, reason or none, to refuse their assent, they should object where their right to object, unless they

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shewed some damage to themselves, would be, to say the least, very doubtful.

I doubted whether it was not premature to decide this question; but I agree that we cannot enable the parties to dispose of the whole matter really in controversy without having recourse to a new action, unless we do decide this question. And, having had the advantage of reading and considering the opinion of my noble and learned friend opposite (Lord *Watson*) I am satisfied that we both can, and ought to decide it.

I think it will be convenient now to read the document on the construction of which I think everything depends. [His Lordship then read the agreement of the 21st of February, 1878, which will be found in Lord *Watson's* opinion, *post*, p. 352.]

I think that the words "by the end of the policy of *Thurso Castle*," in their primary and natural sense, mean skirting the policy outside the end of it, but I do not think they are so express as necessarily to mean nothing else. And if the state of things with relation to which the agreement was made had been known to both parties to be such that no tramway could practically have been made outside the park wall and between it and the river, so that no tramway could have been made to the company's works at *Thurso East* without going across the policy, I think that the words might have been construed in a secondary sense as meaning that the line was to go across the policy near its end. But this is not the case. The private road of Sir *Tollemache*, which is used as a cart road by the Pursuers, is a line along which a tramway might very well be laid. It is suggested that the co-operative company might object to rails being laid along the road where it passes between the two portions of land occupied by them as a pavement yard. It is, I think, a mistake of fact to say that they have objected. And in common with all the Judges below, I do not see on what ground they could object. But even if they had a right to object, and exercised that right, that would not, as I think, be an admissible ground for construing the agreement of the 21st of February, 1878. It would raise the question, whether under this agreement Sir *Tollemache* did more than agree to allow the Pursuers to take this road for the purpose of laying the tramway on it without making any charge for it, leaving it to them

to overcome the objections of the co-operative company if they were unfounded, or, if the co-operative company were able to shew that they had a valid ground of objection, whether Sir *Tollemache* was bound to make compensation in damages for having promised more than he could perform.

I have, not without hesitation, come to the conclusion that it is necessary to decide this; and I think, therein agreeing with Lord *Shand* and the Lord Ordinary, that all that the Defender bound himself to do was to give the Pursuers such rights in the ground as belonged to him, and allow them to use such rights for the purpose of forming the line and overcoming any opposition that might be offered to it, making no charge for so doing. But I do not think that the agreement involves any engagement on the part of the Defender to indemnify them against such opposition, or, in the improbable event of its being well founded, to allow the Pursuers to carry the line across the policy.

I should have come to this conclusion on the words, and from the nature of the agreement, but the express stipulation as to making compensation to the tenants along the line for any damage done to their farms during the currency of their leases strongly confirms that view. It was known to both parties that the Defender had reserved in his leases a right to take possession of such part of their farms as was needed for the purpose of making roads across them, making compensation; and I think that they agreed that the Pursuers should exactly stand in his shoes in that respect. And this, I think, throws light upon the intention of the parties as to what was to be done in regard to the road through the co-operative company's yard.

I think that this was not the view taken by the Lord President, Lord *Deas*, and Lord *Mure*, and I think that, construing the interlocutor appealed against by the aid of what they said, the finding in it that the Defender is "bound to furnish gratuitously the ground necessary for the formation," &c., must be, or at least may be, read as deciding this question against the Defender. It is the only point in which I think their interlocutor wrong, but I think it is wrong in that, and that it should be altered in the manner proposed by Lord *Watson*.

I agree that the Defender below was justified in coming to this

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House to get rid of this interlocutor, and though he, no doubt, was also desirous of setting up the substituted agreement of September-October 1878, and was wrong in that, I think he should be allowed his expenses of the appeal, as well as those in the Court below.

LORD WATSON:—

My Lords, the Respondent Company are tenants of the slate and pavement quarries of *Weydale*, *Heathfield*, and others, in the parish of *Thurso* and county of *Caithness*, under a lease from the Appellant for a period of twenty-one years, ending on the 11th of November, 1895. The subjects let to the company include a yard at *Thurso East*, lying on the west side of the policy of *Thurso Castle*, between the policy wall and the *Thurso River*, in which the rough material from the quarries is dressed and prepared for market. Down to the year 1878, the undressed stones were carted from the quarries, which are situated about three miles to the south-east of the yard.

On the 21st of February, 1878, an informal written agreement was entered into between the Appellant and the company, by which the latter undertook to construct "a tramway or railway from the *Old Weydale Quarry* by the *Moss of Weydale*, thence near *Stainland House*, near *Oldfield House*, and by the end of the policy of *Thurso Castle* to their works at *Thurso East*." The company agreed to compensate the tenants along the line for any damage done to their farms during the currency of their leases, and the Appellant, on the other hand, agreed to "give gratuitously the land required for the said tramway or railway." It was also arranged that the direction of the line should be adjusted between Mr. *Logan*, the Appellants' factor, and the company. The agreement, though improbative, has been validated *rei interventu*. The route from the *Old Weydale Quarry* northward, till it approaches the county road leading from *Wick* to *Thurso viâ Castletown*, was amicably adjusted in July, 1878. The county road runs along the wall which bounds the policy of *Thurso Castle* on the south-east; and a private road, belonging to the Appellant, branches off from it, at the southernmost corner of the policy, and leads straight north, running for some distance along the west wall of the policy, after which it intersects a pavement yard leased by the Appellant

to the *Caithness Co-operative Company*, and then enters the yard of the Respondent company, from which there are accesses to the offices of *Thurso Castle*. The line of tramway, so far as adjusted in July, 1878, was shortly thereafter constructed; and, pending the disputes which have arisen as to its further course, it has been extended up to the south-eastern margin of the county road. From the quarries to that point stone and slates are carried by means of the tramway, and are thence conveyed to the yard in carts along the private road. That road has all along been used by the Respondents for cartages to and from their yard at *Thurso East;* and, by the terms of their lease, they are under obligation to pay two thirds of the cost of maintaining it in a good and sufficient state of repair.

The Respondents, in July 1878, proposed that the tramway, after crossing the county road, should enter the policy a little way to the east of its southmost corner, and should thence proceed northward through the policy until it reached their yard; and the precise line which they proposed to follow was marked out, and submitted to Mr. *Logan* for his consideration. The Respondents allege that Mr. *Logan* did actually agree to and adjust with them the line thus indicated; but they have failed to prove the allegation, and it is certain that the Appellant objected, and has ever since disputed the right of the Respondents to construct any portion of the tramway within the policy, under the agreement of the 21st of February, 1878.

The action, in which the present appeal is taken, was not raised by the Respondents,—for reasons which will shortly appear,—until the 15th of August, 1879. It concludes that the Appellant be ordained to give them the use and possession of land for the purpose of completing the tramway, and that either (1), "within and by the end of the policy of *Thurso Castle*," or (2), "in any other place as suitable and convenient for the Pursuers in every respect." The second of these conclusions is wide enough to cover every possible line of access to the Respondents' yard, other than a line "within and by the end" of the policy, and is therefore sufficient to include any line outside the policy. The action is laid upon the agreement of February, 1878, and the Respondents first allege that, in July of that year, Mr. *Logan*, acting

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for the Appellant, finally adjusted and settled with them the line then staked out through the policy in terms of the agreement libelled on, and failing that, they allege right to have some other equally convenient route. The terms of the 6th article of their revised condescendence not only make it clear that, before bringing the Appellant into Court, they insisted upon a route within the policy, but very strongly suggest that it was their intention, under the alternative conclusion of the summons, to demand no other route. Their main contention has been that they are entitled, under the agreement in question, to pass through the policy, and, in support of that claim, they aver (cond. 5) that "there is no route outside the policies of *Thurso Castle* over which the said proposed tramway, as described in the agreement, could be constructed to the Pursuers' works, or along which the Defender could gratuitously give the Pursuers land on which to lay the said tramway. Immediately outside the said policies there is a road which occupies the whole available space for a tramway between the policies and the shore of *Thurso River*, and the ground occupied by the *Co-operative Pavement Company*, over which the Defender can give no right to make a tramway, intercepts all communication between the Pursuers' works and the point where the tramway line, so far as already constructed, ends, unless the tramway be led through the policy of *Thurso Castle* the whole way from the said public road between *Thurso* and *Wick* to the Pursuers' works." I do not think these averments were intended to convey the idea that the formation of a tramway along the private road, all the way from the county road to the Respondents' works, is a physical impossibility. What, in my opinion, the Respondents thereby meant to assert, and do assert, is that the Appellant was not in a position to give them an absolute right to form the tramway upon that part of the road which intersects the yard of the co-operative company, — that the Appellant was bound, under the agreement of February, 1878, to give them an absolute right to ground for the tramway, free of all claims at the instance of third parties,—and that, being unable to fulfil that obligation, by giving a route through the co-operative company's yard, he must implement it by giving a route through his policy.

The Appellant meets these allegations with a general denial,

and the only substantive defence which he sets up is founded on two missives, dated respectively the 28th of September and the 21st of October, 1878, by which, he maintains, a valid agreement was constituted, binding the company, subject to the provisions therein made in his favour, to take a strip of the policy ground twenty feet in breadth, along the east side of the private road, for the formation of their tramway. The following is the history of those two missives. At a meeting which took place on the 28th of September, between the Appellant, his factor, and several members of the Respondent company, an offer was written by Mr. *Logan*, to the Appellant's dictation, by which, in consideration of certain alterations to be made upon the conditions of the Respondent's lease, the Appellant undertook to give them the said strip of ground, provided they took down the policy wall and rebuilt it on the east side of the tramway. That writing was handed, unsigned, to the members of the company present by the Appellant, and the offer therein contained was formally accepted, by a holograph letter, written and subscribed by the managing partner of the company, dated the 21st of October, 1878.

I think the Lord President is under a misapprehension when he says that the contract embodied in these two missives "was no sooner agreed to than the parties differed as to what it meant." On the contrary, whilst both parties acted on the footing that the contract was binding until June, 1879, I can find no trace of any difference having arisen as to its meaning before the month of May, 1879. It appears to have been assumed on both sides that the execution of another deed was necessary in order to give effect to the provisions of the contract, and accordingly, on the 29th of October, 1878, a deed of agreement, in duplicate, subscribed by the Appellant, was sent by Mr. *Logan* to the Respondents for their signature, with a request that one of the duplicates should be returned to him, to be put up with the principal lease. So far from objecting to the terms of the deed, the managing partner of the Respondent Company, on the 31st of October, informed Mr. *Logan* by letter that it could not be signed by all the partners owing to the absence of one of them, and a month afterwards he wrote to Mr. *Logan* that, in consequence of the continued absence of that partner, he could not yet send the signed

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deed, but would do so as soon as possible. It does, however, appear that in May, 1879, some objection was taken by the Respondents to the terms of the agreement, whereupon a minute was substituted for it, which was sent in draft to the Respondents on the 19th of May, by the Appellant's solicitors. On the 31st of May the Respondents wrote that they had not been able to finish the revisal of the draft minute, but hoped to be able to do so in a day or two. The objections which they ultimately stated to the terms of the minute were confined to one clause, providing "that the tenants shall have liberty to occupy the said strip of ground for a tramway only, and that until the expiry of the said lease at the term of Martinmas, 1895, and no longer." They apparently asserted their right to use the strip in question in perpetuity, and that not only for tramway purposes, but as storage ground. Mr. *Logan*, on the 9th of June, 1879, refused to concede that right, and refused to give them possession of the ground until the clause was adjusted, either amicably or by a Court of law. In reply to that communication, the Respondents on the 17th of June, intimated that they resiled from the contract of September and October, and reverted to their rights under the agreement of February, 1878; and they at the same time requested Mr. *Logan* to point out the route along which their tramway was to be laid in terms of that agreement. I observe that two of the learned Judges of the First Division regard the words of the disputed clause as additional to and constructive of the contract, and hold that the Respondents were ready to adopt, in the minute proposed, the *ipsissima verba* of the contract, and that Mr. *Logan* was wrong in insisting that words should be inserted which were not in the original writing. I am unable to concur in that view, because it is based on the assumption that the whole terms of the contract were to be found in the Appellant's unsigned offer of the 28th of September, and ignores the fact that, in the Respondents' acceptance, which is *pars contractus*, the strip of land in question is described by them as "tramway route added to our present lease."

From the time when they first intimated their departure from the September-October agreement, the Respondents have persistently claimed either the route staked out by them in July, 1878, or some other equally convenient route through the policy

of *Thurso Castle*. On the other hand, the Appellant has, with no less persistency, maintained that the Respondents are still bound by the agreement of September-October, and that they must, subject to its conditions, take the strip of land therein specified. In their eagerness to make good these respective contentions, the parties seem to have lost sight of the possible alternative of the Respondents being only entitled, under the agreement of February, to complete their tramway along a line outside the policy. But the case, as presented to the House, affords ample materials for disposing of that alternative, which is certainly within the conclusions of the summons. The Respondents' allegations, which I have already quoted, negativing the possibility of any route without the policy, and the Appellant's denial of them, have been supported by proof; and they appear to me directly to raise these two questions,—(1), whether, by the agreement of February, the Appellant is under an absolute obligation to provide the ground necessary for the formation of the tramway; and (2), whether there is any possible route outside the policy.

I shall now advert to the manner in which the case has been dealt with in the Court below.

The Lord Ordinary (Lord *Rutherfurd Clark*) assoilzied the Appellant from the conclusions of the summons; and the grounds of his judgment are given in the opinion which his Lordship delivered when advising the cause. The learned Judge did not think it necessary to dispose of the Appellant's defence, founded on the agreement of September and October, 1878. He held that the Respondents' case failed, because, according to the just construction of the agreement of February, upon which it was laid, the tramway was to be constructed not within but without the policy, and the Appellant merely assented, so far as his rights and interests were concerned, to the Respondents making a tramway, and did not undertake to find them the means of making it.

The Lords of the First Division recalled the Lord Ordinary's judgment, and found (1st), that under the agreement of February the Respondents are entitled and bound to construct the tramway therein mentioned; and (2nd), that the Defender, on the other hand, is bound to "furnish" the ground necessary for the formation of the tramway throughout its whole length, and, in parti-

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cular, the ground necessary for the formation of that portion hitherto unformed; and, with these findings, they appointed the Appellant "to state in a minute in what line he proposes that this portion of the tramway shall be formed, and what ground he proposes to 'furnish' for that purpose." The proposition affirmed by the first of these findings does not appear to have been disputed by either of the parties. In the second the words "furnish gratuitously," were introduced for the purpose of construing, in accordance with the opinions of the majority of the Judges, the expression "give gratuitously," which occurs in the agreement, as implying an obligation on the Appellant to give land for the tramway, unincumbered by the rights or interests of any third parties.

The majority consisted of the Lord President, Lord *Deas*, and Lord *Mure*. The Lord President said,—"Sir *Tollemache Sinclair* is under an obligation to find a way for this tramway to go from the public road up to the works at *Thurso East;* and it will be for him to consider in what way he can best fulfil that obligation." Lord *Deas* was of opinion that the difficulty of carrying the tramway through the works of the co-operative company was a "difficulty which must be overcome by the landlord;" whilst Lord *Mure* held the deed of February, 1878, to be "an agreement binding Sir *Tollemache Sinclair* to find ground for the use of that company for the purposes of the tramway to be made to their works." Their Lordships were of opinion that, according to their primary meaning, the words "by the end of the policy" indicated a line of tramway without the policy; but it is my impression that, in the event of the Appellant being unable or unwilling to furnish a line through the co-operative company's yard, their Lordships would have construed these words as imposing upon him an obligation to give a route through his policy. Upon this point the Lord President said,—"But while I construe the agreement in his favour as not imposing upon him an absolute obligation to permit the tramway to go through his policy, I think it does impose upon him an obligation to do what is necessary on his part to enable the Pursuers to fulfil their obligation to him, to construct the tramway from one of its termini to the other." Their Lordships were unanimously of opinion that the agreement

of September-October was improbative, and that no *rei interventus* having followed, the Respondents were entitled to resile from it in June, 1879. Lord *Shand* differed from his three brethren as to the construction of the contract, holding with the Lord Ordinary that, under the agreement of February, the line of tramway was not to be within the policy, and that the Appellant only undertook to give such right to the land required as he was possessed of.

Upon the assumption that the agreement of February, 1878, was rightly construed by the Judges of the majority, I should be of opinion that they did right in appointing the Appellant to lodge a minute stating what ground he proposed to furnish. If the Appellant, in obedience to that order, had judicially stated that he was able and willing to secure to the Respondents the right to lay their tramway along the private road, including that portion of it which passes through the yard of the co-operative company, I see no reason to doubt that the Court would have proceeded, failing the agreement of parties, to settle the line of tramway along that road. On the other hand, if the Appellant had lodged a minute setting forth that he was willing, so far as his rights were concerned, to permit the tramway to be formed along the private road, but declined to make any arrangement with the co-operative company, I think the Court would have compelled him to give ground within his policy.

I am of opinion, with all the Judges of the First Division, that the missive of the 28th of September, 1878, is not a valid holograph writ. I do not doubt that a missive written and signed by a factor or agent, professing to bind his principal, is a probative holograph writ according to the law of *Scotland;* and that, when duly accepted, it will bind the principal if he gave authority, and will subject the writer in damages, if he did not. It appears to me, however, to be sufficient for the decision of this point that Mr. *Logan*, who wrote the document, was not, in any sense, a party to the negotiations on the 28th of September, which resulted in its delivery to the Respondents, for their consideration and acceptance. These negotiations were conducted by the Appellant in person, and it does not appear from the evidence that Mr. *Logan* ever had, or supposed he had, any authority from the Appellant to make such an offer. Even if Mr. *Logan* had

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been the sole negotiator, acting in the Appellant's absence, and by his instructions, I doubt whether the writing would have been thereby validated. The general rule of the law of *Scotland* is that a holograph writing, in order to be effectual, must be subscribed by the writer. In the absence of subscription equivalents have been admitted, such as a reference to the document in a subsequent holograph and subscribed writing by the same person, or the occurrence of the writer's name in the body of the unsigned writing. In the present case there is no such subsequent writ, and the name which does occur in the writing itself, as that of the offerer, is unfortunately not the name of the writer. The Appellant's allegations of *rei interventus* are so palpably irrelevant that I do not think it necessary to make any further reference to them.

But I cannot agree with the construction which has been put by the Lord President and by Lords *Deas* and *Mure* upon the agreement of February, 1878. The primary meaning of the expression, "by the end of the policy," certainly is that the line shall be carried without the policy. No doubt "by" is a flexible word, and its meaning may vary with the context. It may signify "by means of," as in the expression "going by a road." Or it may mean "through," as when one speaks of going "by a field" to a point which is on the other side of it. But, *à priori*, the presumption is that a gentleman who stipulates that a tramway shall be carried "by the end" of his policy, does not intend that it shall go through his policy. And that such was not the intention of the parties to the agreement of February becomes the more apparent on referring to the Ordnance sheet, which is incorporated with the conclusions of the action. The policy of *Thurso Castle* comes to a very narrow point at its southmost corner or extremity, where the private road to the Respondents' yard strikes off from the country road. That southmost corner is plainly what the parties intended to designate by the expression "the end of the policy," and even if the word "by" were read as "through," it appears to me that no route could, in any reasonable sense, be described as "through the end of the policy," which did not lead from the county road to the private road. The line of tramway which the Respondents claim is a line running, not

through the end of the policy, but through the policy itself. I accordingly concur with Lord *Rutherfurd Clark* and Lord *Shand*, in holding that, under the agreement libelled, the stipulation of the parties is that the tramway shall pass outside the walls which enclose the policy of *Thurso Castle*.

I am also of opinion that, by agreeing to "give gratuitously" the land required for the tramway, the Appellant merely undertook to give the Respondents such right as was vested in him, leaving them to settle with any persons who might have a right or interest entitling them to object to the formation of a tramway. It appears to me that these words, according to their natural import, do not mean that the Appellant shall purchase or procure the interests of third parties in the ground to be occupied by the tramway, for the benefit of the Respondents, but that he shall permit the Respondents to use his rights in the *solum* without making any charge therefor; and I am unable to find, either in the terms of the agreement, or in the circumstances of the case, aught that compels me to attach to the words any other than their natural meaning. The evidence shews that, practically, the only route from the county road to the Respondents' yard, outwith the policy of *Thurso Castle*, is along the private road already described; and the only obstacle to laying the tramway along that road which the Respondents have suggested is, that the co-operative company may refuse to allow its being laid along that portion of the private road which intersects their works. Although there are no *termini habiles* for deciding the point, in the absence of the co-operative company, I can see no reasonable ground for holding that the company could successfully resist the continuation of the tramway to the Respondents' works, and there is no evidence that they have attempted or intend to offer any resistance. The terms upon which they proposed to allow the tramway to be made through their works, had no reference to its construction along the road, but upon the *solum* of the yard, exclusively occupied by them, and that was an operation which they had an undoubted right to prevent. I do not think it ever occurred to the parties, when they contracted in February, 1878, that any difficulty would be raised by the co-operative company, and I am confirmed in that impression by the fact that the Re-

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spondents subsequently negotiated with the Appellant on the footing that the strip of land, which he was to give for the formation of the tramway, should terminate at the yard of the co-operative company. Of course the Appellant must not only give the Respondents such rights as he has, but must also allow them to use his name in any proceedings which may become necessary for the vindication of these rights.

For these reasons, I am of opinion that the Appellant is entitled to decree of *absolvitor* from the conclusions of the action, so far as these conclude that he shall be ordained to give the possession and use of any part of his policy for the formation of a tramway. The 6th article of the revised condescendence for the Respondents is so framed that the Court below might have difficulty, owing to the present shape of the record, in adjusting a line of tramway without the policy by a decree under the conclusions of the summons. But that difficulty may be removed by a very slight amendment of the record; and it is plainly for the interest of both parties that the whole matter in dispute between them should be disposed of without resort being had to a new action. I therefore think your Lordships ought to reverse the interlocutor appealed against, except in so far as it recalls the Lord Ordinary's interlocutor of the 27th of February, 1880; to declare that the Appellant is entitled to *absolvitor* from the first alternative conclusion of the summons, and also from the second alternative conclusion, in so far as the same relates to the possession and use of land within the policy of *Thurso Castle*, and that, under the agreement of the 21st of February, 1878, the Appellant is not bound to give to the Respondents any rights in the ground required for the completion of the tramway, except such rights as belonged to him, he being always bound to allow the Respondents to use his name in any proceedings they may be advised to take for the vindication of these rights; and subject to these declarations, to remit the cause to the First Division of the Court of Session, with directions to dispose of the second alternative conclusion of the summons, in so far as the same relates to the possession and use of land without the policy of *Thurso Castle*, and to allow the parties to make such amendments of the record as may be necessary for that purpose. And, seeing that the Appel-

lant has succeeded in his resistance to the demands of the Respondents for a line through his policy, and that he was justified in coming to this House, in order to get rid of the finding pronounced by the First Division, I think he ought to have the costs of the appeal and his expenses in the Court below.

Ordered and adjudged:—That the said interlocutor of the Lords of Session in *Scotland*, of the First Division, of the 9th of July, 1880, complained of in the said appeal, be and the same is hereby reversed, except in so far as it recalls the interlocutor of the Lord Ordinary of the 27th of February, 1880; And it is *Declared*, That the Appellant is entitled to *absolvitor* from the first alternative conclusion of the summons, and also from the second alternative conclusion in so far as the same relates to the possession and use of land within the policy of *Thurso Castle*, and that under the agreement of the 21st of February, 1878, the Appellant is not bound to give to the Respondents any rights in the ground required for the completion of the tramway, except such rights as belonged to him, he being always bound to allow the Respondents to use his name in any proceedings they may be advised to take for the vindication of their rights; and subject to these declarations, it is *Ordered*, That the cause be and the same is hereby remitted to the First Division of the Court of Session in *Scotland*, with directions to dispose of the second alternative conclusion of the summons in so far as the same relates to the possession and use of land without the policy of *Thurso Castle*, and to allow the parties to make such amendments of the record as may be necessary for that purpose: And it is further *Ordered*, That the Respondents do pay or cause to be paid to the said Appellant the costs incurred by him in respect of the said appeal to this House, and also his expenses in the Court below, &c.

Lords' Journals, 7th April, 1881.

Agents for Appellant: *Simson & Wakeford.*
Agent for Respondents: *W. A. Loch.*

[PRIVY COUNCIL.]

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SASTRY VELAIDER ARONEGARY AND HIS WIFE . . . . . } PLAINTIFFS;

AND

SEMBECUTTY VAIGALIE AND OTHERS . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT AT CEYLON.

Law of Ceylon—Presumption of Marriage—Onus Probandi.

According to the Roman-Dutch law there is a presumption in favour of marriage rather than of concubinage.

According to the law of *Ceylon*, as in *England*, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.

Where it is proved that they have gone through a form of marriage, and thereby shewn an intention to be married, *held*, that those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies have been performed.

APPEAL from two judgments of the Supreme Court (Feb. 12, and July 26, 1878), reversing a decision of the District Court of *Batticoloa* (Aug. 5, 1876).

The facts are stated in the judgment of their Lordships. The issue was whether the Appellants had sufficiently proved a valid marriage alleged by them.

Mr. *Gorst*, Q.C., and Mr. *E. W. Stock*, for the Appellants, contended that the Supreme Court had wrongly entertained a presumption contrary to marriage, and had wrongly thrown on the Appellants the burden of proving what were the necessary ceremonies, and that they had been duly performed. The Appellants had proved consent, intention to contract marriage, subsequent belief that they had done so. It rested with the Respondents to prove distinctly and conclusively what the necessary rites were, and that they had not been at any time performed. Reference

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.

was made to *De Thoren* v. *Attorney-General* (1); *Piers* v. *Piers* (2); *Lyle* v. *Ellwood* (3).

Dr. *Phillimore*, and Mr. *Dunham*, for the Respondents, contended that the rule as to *onus probandi* asserted on the other side was established by Scotch authorities, and was not found in Roman-Dutch law. They referred to *Van Leeuwen*, [ed. 1820], p. 71; *Grotius*, Introduction to Dutch Law, p. 24, sect. 16; *John Voet*, book xxiii., tit. ii., of Pandects; *Thompson's* Laws of *Ceylon*, vol. ii., pp. 564, 565.

The counsel for the Appellants were not called on for reply.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This appeal arises out of a suit brought by the Plaintiffs, who are husband and wife, in which it was alleged that the second Plaintiff was, at the time of her marriage with the co-Plaintiff, the widow of one *Pattenier*. The suit was brought against the Defendants to recover a share of the property of *Pattenier*, to which it was alleged that the second Plaintiff, as his widow, was entitled; the Plaintiffs also claimed a share which it was alleged had descended to her from a deceased child of *Pattenier* by her. The question is whether she was lawfully married to *Pattenier*, and the child legitimate.

The first Defendant is a brother of *Pattenier*, and was an executor under his will; the second Defendant was a son of *Paramakuddi Kassenator*, an uncle of the second Plaintiff; and the third Defendant was the wife of the second Defendant, and a daughter of *Pattenier* by a deceased wife. The learned Judge of the First Court found that there was a valid marriage. He said: "First, it is indisputable that second Plaintiff lived in the house"—that is, the house of *Pattenier*—"subsequent to the death of testator's"—that is, *Pattenier's*—"second wife, the mother of third Defendant and her minor sister and brother. Second, it is also

(1) 1 App. Cas. 686. (2) 2 H. L. C. 331.
(3) Law Rep. 19 Eq. 98.

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indisputable that the second Plaintiff gave birth to a child in testator's house, which child survived the testator, though by a few months only. Third, the evidence in favour of second Plaintiff's being the wife vastly preponderates over that supporting the contrary view, not only in quantity, but in quality. If this be accepted, the legitimacy of the child from whom second Plaintiff claims one thirty-second share is also indisputable. In a case of this kind, if there were really any room for doubt, the evidence on either side should be pretty evenly balanced; and yet quite the contrary is the case, Defendants' being by far the weaker."

Upon appeal to the Supreme Court of *Ceylon* that judgment was reversed by the learned Chief Justice. It appears to their Lordships that the Chief Justice threw the *onus* of proof on the wrong parties, inasmuch as he held, in substance, that it was necessary for those who claimed by virtue of the marriage to prove what were the customs of the Tamils with regard to marriage, and that this marriage was legally performed.

Their Lordships have no doubt, upon the evidence, that *Pattenier* and the second Plaintiff lived together as man and wife. It was proved that she visited with him, and that she presented betel to their friends, which their Lordships apprehend a concubine would not do. They not only lived together as man and wife, but there is strong evidence to shew that there was a legal marriage.

Pattenier and the second Plaintiff were Tamils, and the first Defendant, who was called as a witness, proved what the custom was. He said, "She was married according to the custom of the country, but she is not the lawfully registered wife." It is true that the marriage was not registered; but it was not necessary to have it registered, inasmuch as the Act which rendered the registration of marriages compulsory was not passed till after the marriage was celebrated. The witness proceeded: "The ceremony we usually perform is for four or five or six persons to be invited according to the wishes of both parties, and rice ceremony to be performed at the house of the bride or bridegroom. If the rice ceremony is performed it is marriage." The second Plaintiff herself was examined. She said that she was twenty-two or twenty-three years of age: "I lost my parents when I was five or six years old. After their death I was in charge of my sister

Valliamma and her husband. I was there up till a year after I reached puberty. I do not know the year. I then went to my uncle *Kassenator's* house; my aunt, his sister, coming and calling me. I remained there eight, nine, or ten days. After that my uncle, his wife, his son (second Defendant),"—that is important—"his son-in-law and daughter, my brother and aunt, took me to *Pattenier's* house to marry me there." It appears, according to her evidence and to other evidence in the cause, that she was taken to the house for the purpose of being married. It also appears that her brother-in-law was anxious that she should be married to a brother of his, and not to *Pattenier*. She says: "We went on to the house. Rice was ready to be served. They spoke of serving me to the persons who accompanied me. Then there was a row. The row was commenced by my brother-in-law and brother, who stood at the gate." There were two brothers, one who stood at the gate and assisted in making the row, and another who afterwards executed a deed of dowry which will be presently alluded to. "I was at the time inside the house. When I heard the row I asked what it was, and they told me that my brother and brother-in-law were at the gate making the row. Then my uncle and his son got out." In her cross-examination by the second Defendant's advocate she said: "During the row, and before it ceased, rice was served to us, and the people went away. The rice was served before the row commenced. *Pattenier* gave me a kuree cloth. The tali was tied next morning; not tali, but he gave his jewels to my uncle's wife to put them on me, and she did so. There are now present as witnesses who were then present *Kannavate, Pavamattee, Katuramen,* and my uncle's wife. I do not know whether *Sivahami* is present here as a witness or not. On account of this row other ceremonies could not have been performed. Other ceremonies were necessary for marriage, but were not performed on account of the row. My relatives left at the commencement of the row."

Strong reliance was placed by the Defendants upon the statement "that other ceremonies were necessary for marriage, but were not performed on account of the row." It is to be observed that that statement was obtained upon cross-examination, and was probably in answer to a leading question. The witness was, in all

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probability, better acquainted with what ceremonies were usually performed than what were actually essential to the legality of a marriage.

Their Lordships do not attach much importance to the answer. There is evidence from which it may be inferred that the serving of rice was the essential ceremony; and it was proved that rice was served. But the evidence of the marriage does not rest here. It is confirmed in the strongest manner by certain dowry deeds. On the 21st of October, 1866 (the marriage having taken place on the 20th), *Peramakuddi Kassenator*, who was the uncle of the second Plaintiff and the father of the second Defendant, and was also a notary, and therefore more likely than a young woman, the second Plaintiff, to know what ceremonies were essential to the validity of a marriage, executed a deed by which he conveyed to *Pattenier* and the second Plaintiff a garden by way of dowry. It says: "On the 21st day of October, in the year 1866, I, *Peramarkuddi Kassenator*, notary of *Kattankuddiyiripu*, in *Batticoloa*, do hereby acknowledge to have granted a garden in dower to *Sampakoddi Sinnepullai*, my niece"—that is, the second Plaintiff—"and *Sinnepullai's* husband, *Sambekodiajar Pattenier*, of the same place, to the following effect." Then, after describing the boundaries of the garden, it says: "And the said garden, with all the produce thereof, are to be possessed and enjoyed by the aforesaid *Sinnepullai* and her husband, *Pattenier*, according to their pleasure, for ever." That deed was attested by four witnesses, and is stated to have been duly read over and explained to the parties, including *Pattenier*, and to the witnesses; and it is also proved by one of the witnesses that the deed was executed in triplicate, and that one of the parts was handed over to *Pattenier*, who retained it. It appears also from the evidence that *Pattenier* and the second Plaintiff took possession of the garden; that they used it; and that the second Plaintiff, after the death of *Pattenier*, executed a lease of the cocoa-nut trees growing in it to a tenant who was called as a witness, and who proved that under the lease he had possession of and gathered the cocoa-nuts. There seems to be, therefore, no doubt that *Pattenier* and the second Plaintiff acted upon the deed, in which *Pattenier* was described as the husband of the second Plaintiff. On the same day the brother of the

second Plaintiff acknowledged to have granted, in dower to his sister, money, jewellery, and other property, and that she and her husband were to possess and enjoy the same. That deed was also read over and explained by a notary public. It was attested by four witnesses, and it was handed over like the other deed to *Pattenier* and the second Plaintiff; and it appears that the wife took possession of the property. In addition the deeds appear to have been registered in the office of the Registrar of Lands, so that it was made public that the property had been given to *Pattenier* and the second Plaintiff as husband and wife upon their marriage. The second and third Defendants claim the property through the husband, who, by retaining the deeds and taking the property under them, must be taken to have acknowledged that there was a lawful marriage.

A document was put in evidence marked E., which was signed by the second Defendant as registrar, and which was a register of the death of the child of *Pattenier* and the second Plaintiff, in which it was named *Pattenier*, which would not have been the case if it had been merely the son of a concubine. It was proved that the second Defendant was one of the persons who went with the uncle and the second Plaintiff to the house of *Pattenier* in order that she might be married, and he appears to have been present when the ceremony was performed. He therefore was capable of judging whether the marriage was a valid one or not, and whether the child was legitimate or illegitimate; and as a registrar of deaths he registered it as the child of *Pattenier*. Then, again, when the Plaintiffs were married in 1873 he signed the register of their marriage, in which the first Plaintiff was described as a widower and the second Plaintiff as a widow, which she would not have been if she had been merely a concubine of *Pattenier*. Therefore there is evidence, under the hand of the second Defendant, in which it is in effect admitted that there was a marriage; that the lady when she married the present Plaintiff was the widow of *Pattenier;* and that the child which she bore was a legitimate child.

Again, there was a petition put in by the second Plaintiff on the 21st of March, 1870. The second Defendant at that time had not married the daughter of *Pattenier*, and was not interested,

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therefore, in setting up that the marriage was not a lawful one. The petition contained the following passage: "The Petitioner begs to inform the Court that she is the third wife of the late *Sembecutte Kannaku Pattenier*, of *Surepatte*, a principal rich man in this place. The Petitioner further says that the said *Sembecutte Pattenier* (her husband) also gifted her clothes, and she used and enjoyed and lived with him, till his death, as husband and wife. The said Petitioner further says that the said *S. K. Pattenier* married her and lived with her amicably, and also received dowry from her in writing, and she brought forth two children, who are dead. The Petitioner further says that after the death of her husband his brother, *Sembecutte Vaigailie*, has taken all the jewels and ornaments, the clothes, and he delays to return them;" and therefore she prays that she may be relieved. That document appears, according to the evidence, to have been prepared at the instance of the second Defendant and with his knowledge. Therefore there is not only the fact that *Pattenier* and the second Plaintiff lived together as reputed husband and wife, that she visited his friends as his wife, and that he held her out to the world as his wife, but that the second Defendant has in documents under his hand acknowledged, at a time when he was not interested in disputing the marriage, that she was lawfully married. Notwithstanding all that evidence, and after the finding of the first Court, the Chief Justice in his judgment says: "A great deal of evidence was gone into on both sides, and the onus was on the Plaintiffs to prove (1) what are the ceremonies necessary to constitute a valid marriage in the Tamil caste, to which the parties belong; (2) that these ceremonies were duly performed at the marriage in question. On the first point the evidence is so conflicting that it is impossible to gather an intelligible account of what are the ceremonies necessary to constitute a valid marriage amongst the Tamil natives of the *Batticoloa* district." He did not say that it had been proved to his satisfaction that the marriage was not according to the custom; but merely that the evidence was so conflicting that it was impossible to gather an intelligible account of what were the necessary ceremonies, and he threw the onus of proving what were the necessary ceremonies on the Plaintiffs, and found that they had failed in making out

that all the necessary ceremonies had been performed. He proceeded: "So far as the evidence can be followed, the ceremonies seem to vary according to circumstances, such as the position and wealth of the bride and bridegroom, and whether a man or woman is married for the first time. The witnesses also differ as to what are essential ceremonies; and on a review of the whole of the evidence it appears clear that either there is not a well-recognised ceremonial to be observed on occasions of marriage, or that the witnesses were wholly ignorant of what they were called to prove. It is admitted that all the necessary ceremonies were not performed at the marriage in question, but it is alleged that they could not have been on account of the disturbance which took place when the marriage was going on. We think this excuse, even if true, is insufficient in law, as a marriage cannot be taken to have been duly celebrated if any of the essential ceremonies were not duly observed, even though such omission was unavoidable."

It was contended by Dr. *Phillimore* that the presumption of marriage arising from cohabitation with habit and repute did not apply to the case of the Tamils and to *Ceylon;* but it appears from the authorities which he cited that, according to the Roman-Dutch law, there was a presumption in favour of marriage rather than of concubinage. It does not, therefore, appear to their Lordships that the law of *Ceylon* is different from that which prevails in this country; namely, that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. Dr. *Phillimore* did contend that in a district where concubinage was not considered as immoral the same presumption would not arise; but their Lordships cannot agree with him in that respect. It is evident that in the district in which *Pattenier* lived wives are treated differently from concubines, and it is not because a number of persons live in a state of concubinage to be presumed that a man and woman who are living together as reputed husband and wife are not lawfully married. It is evident from the parties going through the form of marriage that they intended to be married; and if they were not married

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according to the strict custom, it was not in consequence of their wish that it should be so. It appears clearly that they did consider that a valid marriage had taken place.

In the case of *Piers* v. *Piers* (1) it was laid down by the House of Lords that the presumption of marriage arising from cohabitation with habit and repute can only be rebutted by the clearest and most satisfactory evidence. The Lord Chancellor said:—"I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord *Lyndhurst* in the case of *Morris* v. *Davies* (2), as determined in this House. It is not precisely the same presumption as exists in the present case; but the principle is strictly applicable to the presumption which we are considering. He says:—'The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive.' No doubt every case must vary as to how far the evidence may be considered as satisfactory and conclusive; but he lays down this rule, that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question."

In *De Thoren* v. *Attorney-General* (3), Lord *Cairns*, then Lord Chancellor, stated that the presumption of marriage is much stronger than the presumption raised with regard to other facts; and he referred to the *Breadalbane Case* (4), in which it was held that the presumption was one which not only might, but ought, to be drawn from cohabitation with habit and repute, although the cohabitation commenced with a ceremony which was not only invalid by reason of the real husband of the woman being alive at the time, but was known by both parties to be invalid.

Their Lordships having come to the conclusion that *Pattenier* and the second Plaintiff lived together as man and wife, and that *Pattenier* held her out as his wife, the presumption of their marriage is not lightly to be rebutted. The Chief Justice did not find that the presumption was rebutted, but he threw the onus of proving a legal marriage according to the custom of the Tamils

(1) 2 H. L. C. 331.
(2) 5 Cl. & F. 163.
(3) 1 App. Cas. 686.
(4) Law Rep. 2 H. L. 269.

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upon the other side. Their Lordships think that the learned Chief Justice was in error in overruling the decision of the Judge of the First Court, who had come to the conclusion upon the evidence that there was a legal and a valid marriage.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the Supreme Court be reversed, and that the decree of the First Court be affirmed. The Respondents must pay the costs of this appeal.

Solicitor for Appellants: *A. Cayley.*

Solicitor for second and third Respondents: *F. H. G. Payne.*

[PRIVY COUNCIL.]

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JOHN T. LAWLESS (MANAGER OF THE BANK OF BRITISH NORTH AMERICA) . . . . . } APPELLANT;

AND

JAMES SULLIVAN AND OTHERS (ASSESSORS OF TAXES FOR THE CITY OF ST. JOHN) . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

New Brunswick—31 *Vict. c.* 36, *s.* 4—*Income Tax leviable on Balance of Gain over Loss.*

The tax imposed by sect. 4 of *New Brunswick* Act, 31 Vict. c. 36, upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense, as the balance of gain over loss.

APPEAL from a judgment of the Supreme Court (April 15, 1879), affirming on appeal a judgment of the Supreme Court of *New Brunswick* (June 30, 1877), upon a special case, the material passages of which are set out in their Lordships' judgment.

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR RICHARD COUCH.

J. C. 1881 LAWLESS v. SULLIVAN.

The question decided in this appeal was whether upon the facts stated in the special case the Appellant bank was or was not liable to be assessed under the local Acts in the sum of $1725 for taxes payable on the sum of $46,000 being the amount of alleged income derived from its business within the city of *St. John*, in the province of *New Brunswick*, during the year before, without taking into account certain losses which had accrued during that period, and which exceeded the income.

The report of the case in the Court below will be found at page 117 of vol. ii. of *Canada* Supreme Court Reports.

Mr. *Benjamin*, Q.C., and Mr. *Jeune*, for the Appellant, contended that upon the true construction of the local Acts the income of a company established out of the province upon which the tax is leviable means the balance of profit made by the company on the transactions of the year. It does not mean the total of the sums earned without any deduction therefrom in respect of sums lost. They referred to the *St. John City Assessment Act*, 1859 (22 Vict. c. 37), ss. 12, 14, 16; 31 Vict. c. 36, s. 4, repealing sect. 15 of the Act of 1859, and in substitution for it; and sect. 5: 34 Vict. c. 18, ss. 1, 2, 3. Income cannot be taken to mean total receipts without regard to losses and expenses, and therefore the actual net profits must be adjusted. Reference was made to *Reg.* v. *Commissioners of the Port of Southampton* (1); *Angell & Ames* [3rd ed.], sect. 454; *Burroughs* on Taxation, sect. 82, pp. 159, 161.

Mr. *Joseph Brown*, Q.C., and Mr. *Reginald Brown*, for the Respondents, contended that the scheme of the Act in question (31 Vict. c. 36) was analogous to that for the imposition of rates on the rental of property, and that income must be taken in the sense of actual receipts not of net profits. The domestic corporations under these Acts are assessed or taxed in respect of their capital, comprising both real and personal estate, and with regard to foreign corporations, as their capital was not within the province, they were intended to be taxable in respect of all that they actually received in the shape of profits from time to time. Otherwise the Legislature would have said net profits if they had

(1) Law Rep. 4 H. L. 472, 484.

so intended; *e.g*, Act 22 Vict. c. 37, and 34 Vict. c. 18, ss. 2, 3. [SIR MONTAGUE E. SMITH:—The burden is on those who seek to put the most onerous meaning on words used to shew clearly that that meaning was intended.] With regard to *Reg.* v. *Commissioners of Southampton* (1), the passage cited in the Court below (page 135) shews that income there was regarded as that which comes in, not as that which comes in less an outgoing. Reference was also made to *Angell & Ames*, p. 135; *Burroughs*, p. 136; *Gilbertson* v. *Ferguson* (2).

Mr. *Benjamin* replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The question to be determined on this appeal is whether the Appellant, as the manager of the *Bank of British North America*, in the city of *St. John*, in the province of *New Brunswick*, was in 1876 rightly assessed by the Respondents, the then assessors of taxes for that city, in the sum of $1725 for the fiscal year, beginning on the 1st of January and ending on the 31st of December, 1875. The question is one of general importance, since it involves the principle upon which any incorporated joint stock bank or other company established out of the limits of the province of *New Brunswick*, and any person doing business out of such limit, but having a branch or agency in the city of *St. John*, is liable to be assessed under the Acts relating to the levying of rates in the said city.

The question was in the first instance submitted to the Supreme Court of the province of *New Brunswick* upon a special case, of which the following are the material paragraphs.

"6th. The bank, during the fiscal year (1875), sustained losses from the business transacted by it within the city during the said fiscal year, and on the whole year's business of the said fiscal year the bank, in consequence of the said losses, made no gain or profit, and none was made or received by or for the bank during the said fiscal year.

(1) Law Rep. 4 H. L. 472, 484. (2) 5 Ex. D. 57.

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"7th. But for the losses made by the bank in the said fiscal year, arising during that year out of the business of the said bank within the said city, the income derived from such business in the said year would have amounted to $46,000; but the losses sustained by the said bank on its business in the said city during the said fiscal year exceeded that amount, and left the bank a heavy loser on its business of said year within said city.

"9th. The said assessors have assessed the said *John P. Lawless* as manager of the said bank, in the present year, in the sum of $1725 for taxes claimed by the said assessors to be payable by the said bank on $46,000 income during the said fiscal year.

"10th. The bank claim that the income on which the bank is liable to be assessed is the gain, if any, received by the said bank from the whole business of the fiscal year, and that as the losses of the business in the said city of the said fiscal year exceeded all the profits which the bank, but for said losses, would have made, the bank in fact made no gain from said business within the said city during the said fiscal year, and therefore received no income from the said business, and are not liable to be assessed as aforesaid."

The Supreme Court of *New Brunswick*, by a majority of three Judges to one, decided that the Appellant, as the agent for the bank, was liable to be assessed for the year in question upon $46,000 income, and accordingly that the assessment made by the assessors, as stated in the special case, was to stand.

Upon an appeal against this decision, the Supreme Court of *Canada*, consisting of the Chief Justice and four puisne Judges, affirmed the judgment of the Supreme Court of *New Brunswick*, Mr. Justice *Henry* dissenting.

On an application for special leave to appeal against these judgments, this Board, considering the general importance of the question, deemed it right to advise her Majesty to grant such leave.

The Provincial Acts relating to the levying, assessing, and collecting of rates in the city of *St. John* are the 22 Vict. c. 37, the 31 Vict. c. 36, and the 34 Vict. c. 18. It will be convenient to distinguish these statutes by the years in which they were passed, and to speak of them as the Act of 1859, the Act of 1868, and the Act of 1871.

The section of the Act of 1859, which dealt with what it will be convenient to call "foreign companies," *i.e.*, companies established out of the limits of the province, but carrying on business by an agent in the city of *St. John*, was the 15th. It may be necessary to refer hereafter to the terms of this section with reference to some of the arguments that have been used in this case; at present, however, it is only necessary to state that it was repealed by the 4th section of the Act of 1868, which is the existing enactment that directly defines the liability to assessment of a foreign company or trader.

The enactment, so far as it is material to the present question, is in these words:—

"The 15th section of the *St. John City Assessment Act* of 1859 is hereby repealed, and in lieu thereof the agent or manager of any joint stock company or corporation established abroad or out of the limits of this province, or of any person or persons, whether incorporated or not, doing business abroad, or out of the limits of this province, who shall carry on business within the City of *St. John* for, or who shall have an office or place of business in the said city of *St. John* for any such company, corporation, person, or persons, shall be rated and assessed, in like manner as any inhabitant, upon the amount of income received by him for the same, as such agent; and for the purpose of enabling the assessors to rate such company or corporation, person or persons, the said agent or manager shall, when required in writing by the assessors so to do, furnish to them a true and correct statement in writing, under oath, setting forth the whole amount of income received for such company or corporation, person or persons, within the city of *St. John*, during the fiscal year preceding the making of the annual assessment."

It is desirable here to note a distinction between the repealed section of the Act of 1859 and the substituted section in the later Act. The former was limited to foreign joint stock companies or corporations, whereas the latter is extended to all persons, whether incorporated or not, who, having their principal place of business out of the limits of the province, carry on business through an agent within the city of *St. John*. All are brought within the same category, and the principle of assessment defined by the section applies equally to all.

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What then, upon the proper construction of the enactment, is that principle of assessment? The answer to this question depends upon the meaning to be given to the words, "the amount of *income*," and "the whole amount of income," received by the agent within the city of *St. John* during the fiscal year preceding the making of the annual assessment.

The Courts in *Canada* have in effect decided that "income" means all the items of profit on the transactions of a business during the fiscal year, without regard to any losses arising from the same business during that year. Their Lordships cannot think that this is a sound or reasonable construction of the enactment.

The most specific definition or description given by the Judges of what in their view is the income of a bank within the meaning of the Act, occurs in the following passage of the judgment of the Chief Justice of the Supreme Court:—

"The income of a bank is its discounts, interest, premium on exchange, &c., and this is earned when received, and forms the income of the bank. If the bank makes bad debts on any business or transactions of the current year, or operations entered into in past years, that is a loss *pro tanto* of capital. This they may make up by borrowing money, or by calls on the stockholders, or so much of the lost capital may be replaced from 'income,' but it was in either case the capital invested that was really lost, not the income. In making up a profit and loss account, the bank would necessarily be debited with all interest paid, losses made, expenses incurred, or disbursements, in fact, all 'outgoings,' and credited with all interest, earnings, or gains, and the balance would be the net loss or the net profit of the year, but certainly would not be the 'income' of the year."

Their Lordships are unable to agree with this view of what would and would not be the "income" of a bank. It must always be borne in mind that the tax is imposed on the income received during the fiscal year, and what therefore has to be ascertained for the purpose of assessment is the income for an entire year. There can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the

balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces, and the proprietor can receive from it. The question is, whether the word "income" in the enactment to be construed is to be understood in a different, and what, for the purpose of taxation, would be a more onerous sense.

It was not and could not be contended on behalf of the assessors that "income" in the enactment meant all the takings or moneys received by a bank or in a trade from customers or otherwise; and it was not denied that it meant profits, in some sense of that word. The contention, as their Lordships understood it, was that the items of profit should be selected from the accounts, and the aggregate of these items treated as being the income of the year.

The learned Chief Justice says, "the income of the bank is its discounts, interest, premium on exchange, &c., and this is earned when received, and forms the income of the bank." He thus, in effect, treats every particular earning as irrevocably subject to taxation, so soon as it is received, though the period of assessment is postponed to the end of the fiscal year. But the Act does not impose a tax on each individual earning or gain, but on the income of the year, which can only be ascertained on taking an account for the whole year. The intention of the Legislature should be very clearly shewn to justify an interpretation of the word "income" which would require that, in the account for the year, the items of profit only should be included, and the losses excluded, although, but for the operations which occasioned the losses, the apparent profits could not have been made. A few instances will shew how such an interpretation would operate. Suppose a bundle of bills are discounted maturing, as would probably be the case, at different dates, there would at once be an apparent profit on the transaction in the discounts; but suppose some of the bills should be dishonoured, and that on the whole transaction the bank ultimately sustained a heavy loss, are the discounts received on the bills which were met to be regarded as taxable income, without regard to the loss the bank sustained on those which were not met? Again, suppose a bank, in order to increase its resources for lending and discounting, takes up money, say at 4 per cent., and, owing to a fall in the rate of interest, can

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only employ it at 3 per cent., is the amount which the bank receives for interest and on discounts at 3 per cent. to be treated as taxable income, without reference to the loss it has sustained by borrowing at the higher rate? Their Lordships cannot think that, on a reasonable construction of the Act, these questions ought to be answered in the affirmative.

It is unnecessary to multiply instances, though it is obvious that many others of a similar kind to those already mentioned, such as commissions received on transactions which result in losses to the bank, may occur in a banking business.

The Judges appear to have assumed that the losses made by the bank in the present case arose from bad debts. This may have been so, but the special case does not specify the nature of these losses, which may have been of the kind above adverted to.

In the cases of merchants and traders, the difficulty of construing "income" as the Courts of *Canada* have done is as great, if not greater than in regard to banks. In the case of a foreign merchant, who carries on business in *St. John* by consigning goods to his agent for sale there, it may well happen that the sale of some of the goods may produce a profit, whilst a loss may occur on the rest of the goods of the same consignment, in consequence either of a fall in prices, the depreciation in the quality of the goods, or the insolvency of the buyers. So, a trader who keeps a general store may gain on some of the articles in which he deals and incur losses on others. In these cases, though the losses balanced or exceeded the gains, and consequently no income was or could be received from the business of the year, it would follow from the construction contended for by the Respondents that the gain on the particular sales which yielded a profit would still be subject to taxation. Such a construction implies, as already observed, that the tax would attach on each sale producing profit, which is not the ordinary or fair meaning of a tax upon the income of the fiscal year.

The Courts in *Canada* have referred to the general scheme and language of the Assessment Acts in support of the construction they have given to the provision in question. In the first place, it was pointed out, referring to sect. 12 of the Act of 1859, that, by the scheme of the Act, the inhabitants of the city were rated

upon the value, not only of their real estate in the city, but also of their personal estate; and it was suggested that, inasmuch as foreign companies and traders could not be taxed on their property, the rate was imposed on the income received by them from business carried on in *St. John*, as being a rough measure of the capital employed in such business. It was argued as a consequence of this supposed intention of the Legislature, that "income" must mean something different from and more than the gain on the balance of profit and loss, for otherwise, it was said, there would not be that equality of rating which the Legislature had in view; but, even if the supposed intention could be safely inferred, it does not, by any means, lead to the consequence sought to be deduced from it. The 12th section of the Act of 1859 provides that the real and personal estate of the inhabitants shall be put down at only "one fifth of the actual worth thereof," and, by sect. 10, all just debts may be deducted; so that, upon the assumption that a profit of 20 per cent. would represent average trade profits, a rate on income in the sense of gain or profit may have been reasonably considered as roughly corresponding with a rate of one fifth of the value of personal property; and this would probably be so, having regard to the provision that debts may be deducted from the total value of such property. In their Lordships' view, therefore, no material support to the construction placed on the word "income" by the judgment under appeal can be derived from the manner in which the personal estate of the inhabitants is to be rated.

With regard to the argument that if, in ascertaining income, the losses of the year are to be considered, it would happen, in the event of losses exceeding profits, that the foreign company or trader would receive the benefit of municipal services without contributing to the expenses of maintaining them, it is to be observed that this consequence is the natural and inevitable result of every tax or rate on income, in the sense of profits derived from trade, and would certainly happen in all cases falling under the *General Assessment Act* of the province of *New Brunswick*, in which "income" is defined to mean "the annual profits or gain arising to any inhabitant from any trade," &c. Precisely the same result would occur in the case of the rate imposed upon one

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fifth of the value of the personal estate or capital of the inhabitants of *St. John*, in the cases where the debts of the owners of such property should be equal to or exceed it. Such cases may obviously occur, since it too frequently happens that traders carry on business, often for a considerable time, after their estate is in this condition. In such cases there would of course be no assessable property.

7 App. Cas 102.

Their Lordships have felt some difficulty in appreciating the view of the Chief Justice, that the bad debts of the current year are a loss "*pro tanto* of capital," and that, in such case, "it is the capital invested that is really lost, and not the income." Surely every banker or trader properly conducting his affairs, would, in the first instance at least, charge losses to income; that is, in ascertaining the income of a year's business, would set the losses of the year against its profits. To treat profits as income and to charge losses to capital would be to enter upon a road leading very directly to financial ruin.

Another argument in support of the judgment appealed from was founded on the use of the words "net profits" in reference to the rating of foreign insurance companies.

The 15th section of the Act of 1859, which first enacted the mode of assessing foreign companies, provided that the assessment on the manager of insurance companies, established abroad, should be taken "on a three years' average of the yearly net profits on insurance of property situated within the city." By the 2nd section of the Act of 1871, in lieu of the above-mentioned provision, it was enacted that the assessment should be "upon the amount of net profits made from premiums received on all insurances" effected in a certain manner. And by the 3rd section, the assessment, instead of being on an average of three years, was to be on the net profits of each fiscal year.

It was argued that the words "net profits" appearing in these enactments raised a strong implication that the Legislature meant by "income" something different from "net profits." This argument has undoubtedly some force, but is not of sufficient cogency to justify an interpretation being given to the word "income," as applied to a commercial business, other than that which it naturally bears. The employment of different language

in the same Act may, in some cases, help to shew that the Legislature had in view different objects, but a change in language cannot be relied on as furnishing a general rule of construction, and the weight to be given to such changes must depend on a view of the entire enactments in which they occur, and the degree of ambiguity existing in the language to be construed. The Act of 1859, in directing that insurance companies were to be assessed on an average of their profits for three years, made separate provision for them; and it may have been thought that, as these companies are not trading companies, and their receipts consist only of fixed and definite sums in the shape of premiums, these sums might be considered and treated as the "income" of the companies, if that word had been used in the special legislation relating to them. In the Act of 1871 premiums are expressly mentioned; the assessment being "upon the amount of net profits made from premiums." On the other hand, an argument favourable to the Appellants may be derived from these provisions. Why, it was asked, during the argument, should insurance companies be assessed upon their net profits only, and other foreign companies and traders, not on their net profits, but on the aggregate of the items of profit appearing in the accounts of the year, without reference to the cost and losses incurred in carrying on the business in which they were earned? The answer given to this question was, that it may have been thought desirable for the protection of property in *St. John* to encourage the establishment of branches of fire insurance companies in the city. But this answer is not an adequate one, for it would seem to be equally desirable to encourage foreign banks and other companies bringing capital to the city, to establish themselves in it. Besides the answer, such as it is, cannot apply to marine insurance companies, for they too are assessed on net profits only, "whatever the subject matter of insurance may be." It is to be observed that the consequence which would follow from the Appellant's construction of "income," viz., that the bank, in years of loss, would contribute nothing to the city, and which was held to furnish a reason against that construction, would indisputably happen, in years of loss, in the case of insurance companies.

Their Lordships have come to the conclusion, upon considera-

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tion of the Act in question, that there is nothing in the enactment imposing the tax, nor in the context, which should induce them to construe the word "income," when applied to the income of a commercial business for a year, otherwise than in its natural and commonly accepted sense, as the balance of gain over loss, and consequently they are of opinion that where no such gain has been made in the fiscal year, there is no income or fund which is capable of being assessed.

The extracts from writers on taxation, which were cited by the Judges at the Bar, are not inconsistent with this conclusion.

The English cases which were referred to by the learned Chief Justice afford no support to the judgment appealed from. In the case of *Forder* v. *Handiside* (1), it was held that, under the provisions of the *English Property and Income Tax Act*, 5 & 6 Vict. c. 35, sect. 100, Case I., Rule 3 (1), a company carrying on the business of ironfounders could not deduct from the net profits of the year a sum of money which had been set aside, in accordance with the terms of its deed of association, as a reserve fund for the purpose of meeting the depreciation of buildings and machinery. It is clear that, under the English Act, losses connected with or arising out of any business during the year would form a deduction from the profits, and in the very case referred to the repairs of buildings and machinery were allowed, as being a proper deduction from the net profits. Their Lordships are at a loss to see how this case lends any support to the judgment, unless, indeed, the assumption of the Chief Justice that the losses of the business are to be treated as a loss of capital, and not of income, were tenable.

The observations of Lord *Chelmsford* and Baron *Bramwell*, in the case of *The Queen* v. *The Commissioners of the Port of Southampton* (2), were directed to the proper construction of the word "income" in one of a series of special Acts relating to the port of *Southampton*. By one of these Acts it was enacted that certain dues and duties should be paid to the Commissioners of the port, and directions were given as to their appropriation. By a subsequent Act creating a dock company in the port, whose operations might tend to diminish the revenue of the Commissioners arising from their

(1) 1 Ex. D. 233. (2) Law Rep. 4 H. L. 449

dues and duties, it was enacted that the dock company should pay to the Commissioners such annual sum as should be sufficient to make up the annual income of the Commissioners from the dues and duties they were authorized to take and receive under the first Act. It is plain that income in the later Act meant the total amount of the dues and duties payable to the Commissioners under the former Act. The decision was to that effect, and that a particular outgoing could not be deducted. The observations cited were addressed to the language and meaning of these special Acts, and have no material bearing upon the construction of the Act now in question.

Their Lordships have not thought it necessary to consider the definite deductions to be made from profits, since the special case neither raises this question nor contains the materials for deciding it. When an inquiry of this kind has to be made, it may be found that income in the Act now in question cannot be construed otherwise than as it is defined in the *General Assessment Act* of the province (38 Vict. c. 6, s. 4), though that Act may not authoritatively govern the construction.

In the result, their Lordships will humble advise Her Majesty to reverse the judgments appealed from, and in lieu thereof to declare and order that, upon the facts stated in the special case, neither the bank, nor its manager, is liable to be assessed in the sum of $1725, or any part thereof, for the fiscal year 1875, under the Acts relating to the assessing of rates and taxes in the city of *St. John*. The Respondents must pay the costs of this appeal to Her Majesty.

Solicitors for Appellant: *Bischoff, Bompas, Bischoff, & Co.*
Solicitors for Respondents: *Linklater & Co.*

[PRIVY COUNCIL.]

J. C.* 1881 *Feb.* 23.

JOHN BATEMAN . . . . . PLAINTIFF;

AND

JAMES SERVICE . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Conflict of Laws—Liability of Foreign Corporation—Lex Loci Contractûs.

Held, that the *Western Australian Joint Stock Companies Ordinance Act*, 1858, does not apply to foreign corporations or to companies incorporated out of *Western Australia* and properly and lawfully carrying on business as such. Consequently a limited company incorporated elsewhere, not having complied with its provisions, can nevertheless carry on business and make contracts in *Western Australia* by its agent without its members being liable individually for its debts and engagements.

Held, further, that a company duly registered and incorporated in *Victoria* could not be again registered as a company in *Western Australia*.

Bulkeley v. *Schutz* (1) approved.

APPEAL from a judgment of the Acting Chief Justice of the Supreme Court (Feb. 20, 1880), whereby judgment, with costs of defence, was given for the Respondent in an action brought against him by the Appellant.

The action was to recover £1233. 9*s*. 2*d*., for goods sold and delivered, freight earned, money lent, and money paid by the Appellant to and for the use of the *Rockingham Jarrah Timber Company, Limited*. The judgment of the Court therein was obtained upon a special case, the terms of which are sufficiently stated in the judgment of their Lordships. The two questions submitted by the case were: 1. Whether, under the circumstances, which are sufficiently stated in the judgment of their Lordships, the Respondent was liable for the payment of the Appellant's claim, the same being for a debt due to the Appellant from the company, incorporated in *Victoria*, but not registered in accord-

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR RICHARD COUCH.

(1) Law Rep. 3 P. C. 764.

ance with the Western Australian Ordinance; and 2. Whether he could be sued for the said debt without joinder in the action of the other members of the company.

The Acting Chief Justice decided that the Respondent was not liable for the Appellant's claim, and ordered the Appellant to pay to the Respondent his costs of the action.

Mr. *Wills*, Q.C., and Mr. *J. E. Horne*, for the Appellant, contended that according to sect. 4 of the Joint Stock Companies Ordinance, 1858, there was a several right of action against the Respondent in consequence of his non-compliance with the conditions with regard to registration prescribed thereby. The contract sued upon was made in *Western Australia*, and must be presumed to have been made with a view to the law of that colony, by which law the parties must be taken to have intended to bind themselves and to be bound. Though the company of which the Respondent was a member was formed in *Victoria*, it was so for the purpose of carrying on business in *Western Australia*, and its transactions in this latter colony must be governed by its law; and the Respondent had not by that law limited his liability. Reference was made to *General Steam Navigation Company* v. *Guillon* (1); *Newby* v. *Von Oppen* (2); *Griffith* v. *Paget* (3); *Princess of Reuss* v. *Bos* (4); *Smith* v. *Anderson* (5); *Greenwood's Case* (6); *Lindley* on Partnership (last ed.), vol. i., p. 333; *Story* on Conflict of Laws, s. 29.

Mr. *Benjamin*, Q.C. (Mr. *Romer* with him), for the Respondent, contended that the company of which the Respondent was a member was, so far as the law of *Western Australia* was concerned, a foreign corporation. As such it was entitled to trade and did trade in the colony of *Western Australia*. It was not a partnership within the meaning of sect. 4 of the ordinance. He referred to *In re General Company for the Promotion of Land Credit* (7), which is *Princess of Reuss* v. *Bos* under another name. The ordinance has nothing to do with this case: see sects. 31, 44.

(1) 11 M. & W. 877.
(2) Law Rep. 7 Q. B. 293.
(3) 6 Ch. D. 511.
(4) Law Rep. 5 H. L. 197.
(5) 15 Ch. D. 273.
(6) 3 De G. M. & G. 459.
(7) Law Rep. 5 Ch. 363.

18 Jan 85 387.

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Again, partners are liable jointly, but as to joint and several liability see *Kendall* v. *Hamilton* (1). [He was stopped by their Lordships.]

Mr. *Horne* replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal from a judgment of the Acting Chief Justice of *Western Australia* upon a case which was stated for the opinion of the Court. The case states that "previous to and at and within the terms mentioned in the particulars of demand, and subsequent thereto, the Defendant was, with more than ten other persons, a shareholder in and he was also one of the directors of a company which was duly formed, incorporated, or registered in the colony of *Victoria*, according to the laws in force in that colony in that behalf, under the style of the *Rockingham Jarrah Timber Company, Limited*, and all the shareholders except two," who are named, resided, and those two now reside, out of *Western Australia*, and out of the jurisdiction of the Court; that "the company," as stated in the memorandum of association, was formed in *Victoria* for the object, amongst others, "to buy, sell, or otherwise deal in *Jarrah* timber and other timber in *Western Australia* or in any other part of the world." The case then states the registration of the company in *Victoria* and its incorporation there, and that the organisation and government of the company were exclusively in *Victoria*, where its directors all resided, and where it had its principal place of business; that the company carried on business on a large scale in *Victoria*, and that its operations in *Western Australia* were conducted by Mr. *William Wanliss*, the then local agent and manager of the company, who acted under a power of attorney, but that the company was satisfied with its incorporation and privileges of limited liability acquired in *Victoria*, and took no steps to procure its incorporation with liability limited in *Western Australia*, either by royal charter, letters patent, or Act of the Western Australian Legislature; nor has it ever been registered under the *Joint Stock Companies Ordi-*

(1) 4 App. Cas. 504.

nance of 1858. It also states the mode in which the business was carried on, and that the cheques by which payments were made were in the form: "The *Rockingham Jarrah Timber Company, Limited,*" signed by *William Wanliss.* It is not disputed that the business was carried on by *William Wanliss,* in *Western Australia,* as the agent of a limited company incorporated in *Victoria.* The transactions were entered into by him as such agent, and the credit was given to such company. The question in the case was, whether the Defendant, who was a shareholder in the company and one of the directors, could be made liable for the debt which had been contracted by *Wanliss* as its agent.

In the argument for the Appellant it was conceded that the general principle was, as stated by Mr. Justice *Lindley* in his work on partnership, "that if a company is incorporated by a foreign Government so that by the constitution of that company the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts and engagements of the company, the liability of the members as such would be the same in this country as in the country which created the corporation." But it was contended that the Legislature of *Western Australia* had a right, if it thought fit, to annex any kind of condition to the carrying on business in their own territory, and that, by the construction which should be put upon the Ordinance of 1858, it had enacted that unless a foreign corporation, carrying on business in *Western Australia,* complied with this Ordinance and was registered according to its provisions, its individual members should be liable to be sued for its debts. It was stated, and properly, that the real question in the case was whether the Western Australian Legislature so enacted.

In considering that question, we may first look at the principle which is laid down by *Story* (1), and quoted by the Chief Justice in his summary of the argument for the Plaintiff, in these words:— "In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own Government, unless they are repugnant to its policy or prejudicial to its interests." Therefore, we have to see whether, upon the true construction of this

(1) Conflict of Laws, 2nd ed. sect. 38.

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Ordinance, the Legislature of *Western Australia* has said that a company incorporated in another colony or in a foreign country, not having complied with its provisions, cannot carry on business or make contracts in *Western Australia* by its agent without its members being liable individually for its debts or engagements.

Now an examination of the ordinance appears to shew that this was not the intention. Its title is, "An Ordinance for the incorporation and regulation of Joint Stock Companies and other Associations, and for limiting the liability of certain of the same." The preamble shews that one of the objects was that members of joint stock companies should be enabled to limit the liability for the debts and engagements thereof to which they are or would be subject. The 4th section is:—"If more than ten persons shall, after the 1st day of January, 1860, carry on in partnership any trade or business having gain for its object, unless they are registered as a company under this ordinance or are incorporated or otherwise legally constituted by or in pursuance of some private ordinance, royal charter, or letters patent, every person so acting shall be severally liable for the payment of the whole debts of the partnership, and may be sued for the same without the joinder in the action or suit of any other members of the partnership." These words are not descriptive of a corporation carrying on business in *Western Australia* by its agent. You cannot say that a corporation is ten persons or more carrying on business. It may or may not be that the corporation which was formed in *Victoria* consists of more than ten persons. That is not a matter to be inquired into in *Western Australia*. The whole enactment appears to be applicable to a case where persons intended to commence business in *Western Australia* in partnership; and if there were more than ten, then, unless registered as a company, each might be sued for the whole debts of the partnership without joinder of any other members of it. It appears to refer to a company proposed to be formed for the purpose of carrying on business in *Western Australia*—not to a corporation existing in another place and coming to *Western Australia* to carry on some business there through its agents. The case of such a corporation does not appear to have been contemplated by this section, and the presumption certainly would be, according to the authorities before

mentioned, that this was not intended. It is not to be presumed that there was an intention, contrary to the comity of nations, to prevent a foreign incorporated company carrying on business at all in the colony, because there would be so many difficulties in the way of a foreign incorporated company registering its members in accordance with the provisions of this ordinance, that practically it could not do so. Then the 5th section contains words which shew that what was meant is, not an existing incorporated company coming to *Western Australia* to trade, but a company which was to be formed there. It speaks in several places of the proposed company. And sect. 18, and other sections which have been referred to by Mr. *Benjamin* in his argument, shew that in many instances it would be impossible for a foreign company to comply with the requirements of this ordinance. Sect. 18 says, that "Once in every year a list shall be made of the persons who, on the fourteenth day succeeding the day on which the ordinary general meeting of the company, or, if there is more than one ordinary meeting in each year, the first of such ordinary general meetings, is held, are the holders of shares in the company," and sect. 35 provides that there shall be a general meeting of the company held once at least in every year. In this instance there appears to have been no shareholder in *Western Australia*, and it might frequently occur that there would be no shareholder in the foreign company resident there. Consequently those provisions could not be complied with.

The whole scope of this ordinance appears to their Lordships to be opposed to the view that it was intended to apply to a company which was incorporated elsewhere. Its object was one which might well be contemplated by the Legislature of *Western Australia*; namely, that persons there who wished to carry on business in partnership with a limited liability for the debts and engagements thereof, if there were more than ten of them, should be registered, but it was not meant to apply to foreign corporations, or companies incorporated elsewhere and properly and lawfully carrying on business as such.

This is in accordance with the decision of their Lordships in the case of *Bulkeley* v. *Schutz* (1), where it was held that "A rail-

(1) Law Rep. 3 P. C. 764.

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way company and a partnership complete and existing in a foreign country is not within the purview of the English Joint Stock Companies Acts of 1856, 1857, so as to enable H.B. Majesty's Consular Court in *Egypt* to issue a sequestration against such of the members of the company as were resident within the jurisdiction of that Court, for not complying with an order of that Court to register the company as one of limited liability under the English Acts." The company there, being a complete and existing company, could not be registered as one of limited liability under the English Acts. Applying that decision to the present case, it is an authority that this company, being duly registered under the ordinance of the colony of *Victoria*, and incorporated there, could not be again registered as a company in *Western Australia*. It was mentioned in the course of the argument that it would not be possible so to register it without, as it were, first disintegrating the company, and making it cease to be, as far as *Western Australia* is concerned, a corporation at all. But it is conceded on the part of the Appellant, and appears from the case, that it was carrying on business in *Western Australia*, and was dealt with and given credit to, as an existing company. It appears, therefore, to their Lordships that the contention on the part of the Appellant that this ordinance is to be construed as prohibiting this company from carrying on its business in *Western Australia* as a corporation, and making the individual shareholders liable, cannot be supported. That was not the intention of the Legislature of *Western Australia*. It was not intended that where business was carried on in this way by the agent of a corporation, and credit was given to it through its agent, the individual shareholders should be made liable.

Their Lordships, therefore, will humbly advise Her Majesty that the judgment which is appealed from be affirmed, and the appeal dismissed with costs.

Solicitors for Appellant: *Wilkinson & Drew.*

Solicitors for Respondent: *West, King, Adams, & Co.*

[HOUSE OF LORDS.]

THE MAYOR AND ALDERMEN OF THE CITY OF LONDON . . . . . } APPELLANTS;

AND

THE SHAREHOLDERS (INCORPORATED) OF THE LONDON JOINT STOCK BANK . } RESPONDENTS.

H. L. (E.)
1881
March 24, 25, 29–31; *April* 1.

London—Foreign Attachment—Garnishee.

The process against a garnishee, to enforce obedience to the jurisdiction of the Lord Mayor's Court in foreign attachment, is personal, and cannot be applied to a corporation aggregate.

Where, therefore, a corporation aggregate was cited, as garnishee, to appear in the Lord Mayor's Court, it was held entitled to maintain prohibition.

The suit of foreign attachment is founded upon ancient custom, and in itself is perfectly valid. The process by which it is sought to be enforced must be strictly pursued according to the custom. Fictitious summonses and returns will render the suit invalid.

No payment, but a payment made by compulsion of law, can discharge a garnishee from his original liability to his creditor.

THIS was an appeal against a decision of the Court of Appeal, which had affirmed a previous decision of the Common Pleas Division (1).

The Respondents had been incorporated under the *Companies Act*, 1862. They had no public officer to represent them in suits in Courts of justice.

On the 18th of March, 1874, *Sarah Griesiell* levied a plaint in the Lord Mayor's Court against *Thomas Griesiell* for the recovery of a sum of £72 18*s.*, and, according to the forms of that Court, issued a process of foreign attachment against the Respondents, alleging that they had in their hands moneys of the said *Thomas Griesiell* to that amount. On the 24th of April, 1874, the Respondents moved in the Common Pleas Division for a writ of prohibition, and were ordered to declare in prohibition. They did so accordingly. The Appellants put in certain pleas setting forth

(1) 1 C. P. D. 1; 5 C. P. D. 494.

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the custom of foreign attachment in the City of *London*, and justifying what had been done under that custom. Demurrers to these pleas were put in, and on the 2nd of November, 1874, the Common Pleas Division delivered judgment against the present Appellants. That judgment was taken befor[illegible] the Court of Appeal and partly argued, but the farther argumer[illegible]ded until certain issues of fact, arising on the pleadings, [illegible] determined, for which purpose a special case in the natu[illegible] special verdict was to be prepared. This was done, and on argument thereon the original decision of the Common Pleas Division was affirmed. This appeal was then brought.

The special case stated, at considerable length, the custom and the formal proceedings under it. The following portions of the special case are all that are necessary to be inserted here :—

Par. 12. "No process against the Defendant issues, and no notice is given to him of the action or attachment, but the Plaintiff makes an affidavit of debt, and gives information in the Mayor's Court office, that the Defendant has moneys or goods in the hands of ——— (afterwards the garnishee).

Par. 13. "Thereupon the serjeant-at-mace serves, upon the person named, a notice, attaching in such person's hands all such moneys, goods, and effects as you now have, or which hereafter shall come into your hands and custody, of the said Defendant, to answer the said Plaintiff, and that you are not to part with such moneys, goods, or effects without license of the Court.

Par. 14. "The next step is to issue a *scire facias* calling upon the garnishee to appear and shew cause why the Plaintiff should not have execution of the goods of the Defendant in the garnishee's hands.

Par. 15. "If the garnishee does not appear, judgment is given for the Plaintiff against him by default.

Par. 16. "If the garnishee does appear, the appearance is recorded, and then a record is made up stating the matters aforesaid, and containing a number of other averments, which, whatever their origin, are now, and have long been, formal and fictitious." Other proceedings are taken, the issues are tried, and judgment (if the case is proved) is given against the garnishee. The Plaintiff in the case may then have execution against the garnishee, to

the amount of the debt, upon the goods in the garnishee's hands. This may be the case though the Defendant has never been personally summoned, nor has appeared. Should he appear, the foreign attachment is dissolved. Upon execution against the garnishee he is discharged as to the Defendant in the action, so far as the goods taken in execution are concerned.

Par. 23. "Besides these proceedings the record of foreign attachment made upon the appearance of the garnishee mixes up with the true history of what has been done, many of which are now, at all events, purely fictitious matters. It begins by stating that the Plaintiff has summoned the Defendant in an action of debt, that the serjeant-at-mace has returned that the Defendant has nothing within the City by which he might be summoned, and that thereupon the Plaintiff has, by word of mouth testified to the Court, that some other person has money or goods of the Defendant in his hands within the jurisdiction, and that thereupon the Court has ordered the serjeant-at-mace to attach the Defendant by such money or goods in the hands of such other person. It then goes on to state a return by the serjeant-at-mace of an attachment made accordingly (the last averment being according to the fact), and to allege that at that Court and three subsequent Courts the Defendant has been solemnly called and made default, and that such four defaults have been recorded. It then proceeds to state (truly) the *sci. fa.* to the garnishee, and the subsequent proceedings already described." Par. 28. "If the garnishee did not appear, judgment went against him by default, and execution against the Defendant's property in his hands might be issued. If he chose to appear, he was obliged to find sureties to be present from Court to Court, until the plea of foreign attachment should be ended; otherwise, he was committed to prison." Par. 29. "Upon judgment for Plaintiff the garnishee could hand over the money or goods attached; if he did not, he might be arrested and committed to prison." Par. 54. "A *capias* has been issued for this purpose, and that form has in many instances been employed where corporations aggregate, but without a public officer, or any such individual person to represent them, have been garnishees. But it did not appear that the propriety of this form of proceeding had ever become the subject of judicial decision."

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The Attorney-General (Sir *Henry James*), Mr. *Webster*, Q.C., and Mr. *R. S. Wright*, appeared for the Appellants, and relied on the long exercise of this custom, and on the fact that corporations had in many instances, and without objection made, been the subjects of proceedings in foreign attachment. The fact that some of the statements made in the course of the process were legal fictions was not material. In many cases in the superior Courts themselves, there were allegations of proceedings which were merely formal and fictitious; but that did not affect the jurisdiction itself. What had been done here had been done immemorially, and the custom had been recognised and confirmed by statute (1). A corporation would come within the meaning of the word "person" (2), and the charters to the City made the custom applicable to all persons whatever. There is not any reason why a corporation should not have goods in its hands attached as a garnishee, the process in fact being against the corporation in its character of stakeholder, and the process affecting the goods, that is the property, of the Defendant in the action, and not the proper goods of the garnishee. A Court has an inherent right to enforce obedience to its lawful orders, and no doubt there is process of the Court applicable as against corporations. If the pleadings as they now stand are defective, the custom itself being perfectly valid, they may be amended, but the jurisdiction of the Court itself cannot be assailed.

Mr. *Benjamin*, Q.C., and Mr. *W. G. Harrison*, Q.C. (Mr. *Kemp*, Q.C., was with them), for the Respondents:—

Where processes are not real but fictitious, the jurisdiction which affects to be founded on them cannot be sustained. Assuming everything in favour of the jurisdiction of foreign attachment

(1) 2 Wm. & M. sess. 1, c. 8: "For reversing the judgment in a *quo warranto* against the City of *London*, and for restoring the City of *London* to its ancient rights and privileges." See also 20 & 21 Vict. c. clvii., the *Lord Mayor's Court Extension Act*.

(2) 2 Inst. 722, in commenting on the 39 Eliz. c. 5, takes the words "all and every person and persons," and says these words regularly do extend to any body politic or corporate . . . ., to such bodies politic and corporate as may alien, as mayors and commonalties, bailiffs and burgesses, &c., and the like, and to all other persons whatsoever."

as an ancient custom, it is clear that that jurisdiction cannot properly be enforced against a corporation, which cannot be arrested and committed to prison, and yet without those acts there can be, under the alleged custom, no enforcement of the jurisdiction against a garnishee. In the certificates of the custom corporations are never mentioned as subject to it. For the reason already given the custom cannot be, in practice, made applicable to them. The confirmation, by statutes, of the customs of *London* were only confirmations of general and ascertained public rights, but did not have the effect of establishing customs which were impracticable in themselves and could not be enforced, and were, in the mode of exercising them, contrary to the principles of law. It is contrary to the principle of law to make the holder of another man's property hand over, to a third person, that property, when the person to whom it belongs has never received notice that his rights to it are to be called in question. The custom set up here is that that may be done—but that is contrary to law—and the special case shews that an unlawful and fictitious mode of procedure is sought to be followed. That cannot be allowed, and the garnishee, the corporation, is entitled to claim prohibition.

[The cases and text-books referred to in the Court below on both sides were cited. They are so fully examined and commented on in the judgments that it has not been deemed necessary to repeat the references to them here.]

April 1. THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, this question arises upon a prohibition obtained by the Respondents against the Appellants, the corporation of *London*, to prohibit certain proceedings against the Respondents (who are a corporation aggregate) by way of foreign attachment according to the custom of the City. The case in the first instance came before the Common Pleas Division of the High Court of Justice upon demurrer; the demurrer of course assuming the facts, as pleaded by the corporation, to be true. According to those facts, as they were then pleaded, the custom appeared in all respects to have been followed in point of fact; that is to say, the different steps and proceedings appeared to have been taken according to

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the custom as anciently certified, subject to this question only, whether the custom, so followed, was applicable to a corporation aggregate. The Common Pleas Division held that it was not; and the substantial point to be now determined is, whether that decision, upon those pleadings, was right; for which purpose we must leave out of sight all variance between the facts as they really were, and the facts as pleaded.

When the case was brought before the Court of Appeal, both sides agreed, that it would be convenient to have the facts before the Court, as well as the pleadings; in order that the question of substance might be determined upon the true materials in that stage, instead of being postponed, to be determined afterwards in some other way. A special case was accordingly stated, by which it appeared, that all the preliminary and introductory proceedings, pleaded as having taking place, were merely fictitious, and had never taken place at all. Other facts of importance, with regard to the practice under the custom, at different times, were also found by the special case; and it was agreed, that, for the purposes of the decision of the demurrer upon appeal, the Court should take judicial notice of all the facts so found by the special case.

I pause to observe that, under those circumstances, there was really no question whether the custom itself, such as it was certified to be in ancient times, if followed in fact, in a case properly falling within it, was good or bad; and nothing which has taken place in the case, nothing which may now take place in your Lordships' House, will, in my opinion, throw any doubt upon the validity of that custom, if duly and properly followed in cases which really fall within it.

Upon the facts, as stated in the special case, the Court of Appeal held, first, that the custom had not been followed in divers necessary points, as to which fictitious statements had been introduced upon the City record; and, secondly, that the demurrer, taking into account both the original pleading and all the new matter, of which, according to the agreement, the Court was to take notice, had been properly disposed of by the Common Pleas Division. In this state of things, there is now only one question really before your Lordships; and that is, whether a corporation aggregate is within the custom. It was not seriously disputed at

the bar that the custom as it had been anciently certified, which alone could be binding, required that there should be a real Defendant, and real proceedings taken with a view to summon him, and to put him in default, before a foreign attachment could issue against his goods or his debts, in the hands of, or due from, a third person in the City. It was admitted, that there had been, in this case, no such proceedings; and it was felt, therefore, that the judgment of the Court of Appeal, upon the whole facts, was one which it would not be possible to disturb. The argument was in substance confined to the question upon the demurrer, into which of course these facts contradicting the matters pleaded could not enter, although the other facts as to the custom, and the practice under it, found by the special case, can now be taken judicial notice of, as they were in the Court of Appeal.

Addressing myself to that question, which I consider the only one before your Lordships' House, namely, whether a corporation aggregate is within this custom or not, the first matter which it is proper to consider is the nature of the custom itself. Foreign attachment is an incidental process against a Defendant to a suit, who has not appeared, having been summoned according to the course of the Court, to compel his appearance. The only thing which makes such a custom reasonable at all, and capable of being sustained in law, is, that the Court which has jurisdiction over the Defendant, is in substance, by this custom, acting against the Defendant alone, to compel his submission to that jurisdiction. For this purpose, it arrests or attaches his goods within the jurisdiction, or the debts owing to him within the jurisdiction, (which are equivalent to his goods,) by way of security to enforce his appearance, in whatever hands they may happen to be found. The stakeholder, the person in whose hands these goods of the Defendant may be, or from whom the debt is due to the Defendant, has no interest in the matter, and does not suffer in any interest of his own, so long as he is properly indemnified; and the custom, if duly followed, indemnifies him.

As against the garnishee (that is the third party, the stakeholder) the whole proceeding is *res inter alios acta*. He is no party to the suit; no judgment, in any proper sense of that word, can pass against him in that suit, or be executed against

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him, on any principle which is applicable to a Defendant before a competent Court. In order to bind him, and in order also to indemnify him, the custom must be strictly applicable to the case, and it must be followed in all material points. The effect of the custom, when so followed, when the goods in his hands are delivered over, or when the debt due from him is paid, (or security given by him for its payment, if it is not payable at the time,) is to discharge him, not by virtue of the terms of his contract, but against that contract, and without the consent of the bailor or creditor, from all further liability for the goods or money to which the bailor or creditor was entitled. That is the peculiar effect of the custom; and upon what principle is it possible that such an effect can be produced? On one principle only, that of a delivery or payment by compulsion of law. If that element were absent, it would be impossible that he could be absolved, as against his creditor, from a debt which he has paid, without the creditor's authority, to a person to whom it was not payable by the contract. But if it be by compulsion of law, then he is discharged. It may be by compulsion of law if the custom is reasonable; and the custom, being long established, is not in law unreasonable, so long as its operation and effect is strictly limited to its proper object, that of compelling the submission of a Defendant, in an action duly instituted against him before a competent Court, to the jurisdiction of that Court in that action; and so long as it is pursued only against that which is ascertained to be the property, or the debt, of that person, the Defendant in the action, in the hands of the garnishee.

Therefore, my Lords, execution, by some process of law which amounts to compulsion, is indispensable for this purpose, indispensable for the indemnity of the garnishee, and therefore indispensable in order that the garnishee should be bound. And so it appears to be, according to the certificate given by *Starkey* in the year 1481, in the case of *Bourgchier* v. *Colyns* (1). "After such security found, and execution of that sum, so in the hands and custody of that other person attached and defended, had by the Plaintiff in the same plaint, such other person should be dis-

(1) Law Rep. 2 H. L. 242, n.; *Thorpe's* Saxon Laws, 35; *Bohun's Privilegia Londini*, ed. 1723, p. 253 *et seq.*

charged of the same sum against the Defendant named in the plaint aforesaid, and the same Defendant should likewise be discharged of so great a sum of the debt specified in the same plaint against the Plaintiff named in the said plaint." When the certificate says, "after such security found," that means, security which is to be given for restitution within a year and a day, if the Defendant appears and gives bail as the custom requires. That having been the essential condition of the discharge of the garnishee according to this ancient certificate, the modern cases of *Wetter* v. *Rucker* (1) (which was not indeed the first case of the kind, for earlier authorities are referred to in it) and *McGrath* v. *Hardy* (2) shew emphatically, that the whole effect of the custom against the garnishee depends upon the fulfilment of that condition. Without execution, it is nothing; without execution the payment is voluntary; and all the other proceedings leave him, although he hands over the goods or pays the money, still liable to his original creditor.

Now what is execution, within the meaning of that principle? I apprehend it is that process of the Court against a garnishee, which, if disobeyed, the Court can and will enforce against him. It is not necessary to refer to the form of that process; I rather think, from the statement in the 29th paragraph of the special case, that it must be what is there set out, an authority from the Court to its officer to receive the debt, if it be money, or the goods, if it be goods.

In that state of the case, that being the principle by which it must be governed, we have nothing to do here with the question, whether the mere terms of the custom, as certified by *Starkey*, and stated in other ancient books (such as the *Liber Albus*, and the "City Law,") would by themselves shew that a corporation is excluded. It may be assumed, that they do not. *Starkey* in his certificate states the custom thus: "it shall have been testified and alleged, by the Plaintiff, that any other person, for whatever reason, should be indebted to the Defendant in any sum of debt." No doubt, as far as these words go, there is nothing to prevent a corporation from coming within the custom; because the word "person" might be applicable to a corporation, unless there were something

(1) 1 Bro. & B. 494. (2) 4 Bing. N. C. 782.

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in the context to exclude it; and in the mere reason of the thing, if in all other material and necessary respects the custom could be pursued against a corporation, there would not appear to be any objection to understanding the word "person," there, in as large a sense as it is capable of in law. The same remark applies to the *Liber Albus*, and the "City Law," which is a translation from it. In the "City Law" (1), the words are, "where it is alleged that the Defendant hath goods and chattels or debts in other's hands, or in other's keeping, within the said City." These words are certainly large enough to include a corporation, if, in all other necessary respects, the custom could be applied to it.

But the question is, whether that which is of the essence of the custom, in order to bind the garnishee and to discharge him, can be done in the case of a corporation? Whether the custom provides any means of enforcing the delivery of goods, or the payment of a debt, against a corporation garnishee? If it does not, then according to principle, and according to the authorities, a payment by the corporation would be voluntary, as was decided in *Wetter* v. *Rucker* (2). Though everything else may have been done which the custom would authorize, yet, if it has not been brought to the point of compulsion in law (which it cannot be if there are no means of compulsion in law) the payment is voluntary, and the garnishee is not discharged.

I do not think we have here anything to do with the question whether a corporation can or cannot be a Defendant to a suit in the Lord Mayor's Court. That, as I understand the matter, does not depend upon custom. The City Courts are held under the City charters; and, if there be nothing to prevent a corporation from being sued, I am not at all satisfied, that there are not processes of the City Court by which a judgment of that Court may be executed, either in favour of a corporation Plaintiff, or against a corporation Defendant. When, in a Court of competent jurisdiction, final judgment passes against a Defendant upon a matter in dispute, execution follows by all the ordinary legal means, and, to use language which was used at the Bar, the Court will employ all its inherent powers to enforce its judgments. The

(1) At page 109. (2) 1 Bro. & B. 494.

City Court, in that respect, would be like any other of the Courts of the realm. Of those inherent powers to enforce judgments the writ of *fieri facias* is one, and there are other writs analogous to it; and against a corporation, there is also sequestration or distringas. There is therefore, according to the ordinary law, and having regard to the inherent powers of Courts to enforce their judgments, no apparent difficulty in using against a corporation those means; which are as effectual against a corporation as against anybody else, and one of which is specially adapted to the particular case.

These considerations, however, are inapplicable to the case of a person, who is not a Defendant sued by any Plaintiff in a Court of competent jurisdiction, who is not amenable as such to the ordinary process of that Court, but who is affected only by a collateral process against another person, the Defendant in a suit. There are no ordinary means, there are no inherent powers of the Court, when the Court is dealing, not with a Defendant who has had final judgment against him, but with a mere stakeholder who is not a party. As to such a person, everything must depend upon the custom alone; nothing can be done, which the custom cannot be shewn to authorize. *Fieri facias* is clearly inapplicable in such a case, because there is no judgment against the garnishee in any true sense of the word; certainly there is no final judgment to be executed. With regard to distringas or sequestration, those are processes which might perhaps have been available, if there had been a custom to use them; but, if there is not such a custom shewn, I know no principle of law from which you can infer or imply that they are to be used, merely for the purpose of bringing within the custom a legal person, who, otherwise, could not be put in the position of having to pay a debt by compulsion of law.

My Lords, the only customary mode of execution against a garnishee, of which any proof has been offered, is a process *in personam* to compel obedience to the attachment; on the principle, I suppose, that the Court having authority, founded on its jurisdiction against the Defendant in the action, to attach that Defendant's goods, or a debt due to him, when it exercises that jurisdiction and gives notice of it in the customary manner to a

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third party, (the garnishee,) he is bound to render obedience to that lawful order. It is upon the footing of personal disobedience to an order binding on him, in a case where there is no jurisdiction against his property, but only against his person, that by personal process his obedience to that order is secured.

It is admitted that *Gascoyne* v. *Penyke* (1), a very ancient case of the fourteenth century, decided in the year 1374, is the only authority which can be discovered in which anything else than personal process clearly appears to have been used. I say "clearly appears," because it was contended at the Bar, that you might infer from one other case, that there had been some other process; I will presently mention that case. But it is stated in the special case that there is no authority discoverable for the use of any but personal process, except *Gascoyne* v. *Penyke* (1), and that statement was not otherwise disputed at the Bar, than by suggesting that you might infer something of the same kind to have taken place in one or two other instances, in which it did not expressly appear.

Now, my Lords, *Gascoyne* v. *Penyke* (1) has really been given up at the Bar. I do not think that it can possibly be reconciled with what appears upon the whole course of the practice under the custom, from *Starky's* certificate downwards; because in that case the process of *fieri facias* against the garnishee's goods was ordered to be issued and executed in the first instance, and if nothing could be taken under that, then the personal process of *capias* was to be resorted to. It is admitted, on all hands, that the practice under the custom has been to issue at once the personal process of *capias* against a person subject to that process; and therefore to interpose, as something to come before it, the very different process of *fieri facias*, is wholly inconsistent with the practice which is proved to have been followed.

An ingenious (and, if the record would admit of it, a not improbable) explanation of that case of *Gascoyne* v. *Penyke* (1) was suggested in the able argument of Mr. *Harrison* at your Lordships' Bar. It was this, that there had been, in that case, a prior proceeding in which the garnishee had appeared, and in which, admitting the justice of the Plaintiff's claim as against the De-

(1) Rolls and Memoranda (A.D. 1374) A. 19, Roll 19.

fendant as he had made it in the action or suit, he admitted also that he was himself authorized to receive, but had not at that time received, from two particular debtors, moneys which were due from them to the defendant. The suggestion was, that if the custom under these circumstances was duly followed, the Court, when he made that admission, would have adjudicated against him, that, when he received those moneys from those persons, he should pay them over, according to the custom, to the officer of the Court for the purposes of the suit; and not only so, but that he should then and there give security (his own and that of sureties, or perhaps his own alone) that he would make that payment; and that the *fieri facias*, ultimately issued, would have been founded upon the security which he was assumed to have given upon the former occasion. The difficulty I felt in accepting that as a satisfactory explanation was this, that I cannot understand how, if that had been the foundation of the proceeding, the record could have been drawn up in a form which took no notice of the fact that any such security had been given: and that difficulty the learned counsel was not able to remove.

But, my Lords, all which it can be necessary to say about that case is, that either that is the true explanation (which, if accepted, makes it inapplicable to the present case), or, if that be not the true explanation, then it stands alone, and is in contradiction not only to the custom as certified and stated in the books, but to the custom as it has since been uniformly followed. Your Lordships cannot possibly take it as an authority, that according to the custom *fieri facias* can be issued against a garnishee; and I greatly doubt whether, if such a custom had been set up, it could have been maintained as reasonable; the jurisdiction of the Court, against the garnishee, being simply and solely against him as a stakeholder of the Defendant's goods. To issue a *fieri facias* against the goods of the garnishee who is not before the Court to answer for himself at all, but who has only to answer for specific property of another in his hands, would seem to be inconsistent with that principle.

With regard to the other case, as to which it was said that we ought to read between the lines something implying some process against goods different from personal process, the case of *Huet* v.

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Massana (*Locke* garnishee) (1) in 1446, I can only say that I am unable to read that as it was put by the learned counsel at the Bar. I cannot see in it any indication whatever of a departure from the ordinary process. The words "arrest" and "attachment" are used, but solely with reference to the goods of the Defendant. The whole record, if examined from beginning to end, appears to me to be perfectly consistent with the supposition, that nothing else was done than to serve upon the garnishee that final process, in the ordinary course of attachment, which introduces the power of compulsion by personal process. The man against whom that was done, *Locke*, set up a claim of privilege, because he was going on legal business to one of the Courts at *Westminster*. He said that there was a privilege, not only that a man should not be molested himself in respect of his own goods, but also that he should not be molested in respect of the goods of anybody else in his hands. It is unnecessary to say how far such a notion of privilege could have been entertained; however, that was his ground, and what he complained of was that the goods of another person in his hands were attached—simply attached, as I assume from the rest of the record, by that which may be described as the final process of attachment, which would be equivalent to execution, (though not in this case actually followed by *capias*,) while he was so engaged. In my judgment, there is no evidence on that record of anything but the ordinary practice of attachment under the custom.

Well, then, my Lords, precedents of corporations against which this process of attachment has actually been used, from the year 1796 downwards, have been referred to. It is not necessary to examine those precedents with any minuteness. It was admitted at the Bar that it does not appear, as to the earlier of those precedents, that anything was done which would indicate submission on the part of the corporations to the process; much less that any form of compulsory process was issued against any of those corporations for disobedience. But there is an observation which tends to deprive that whole series of precedents, although going back for nearly a century, of the weight which perhaps in many cases might be due to recent practice as evidence

(1) Rolls and Memoranda (A.D. 1446) A. 73, Rolls 12–15.

of an older custom; and that is, that the present special case states that for a long time past, which I cannot but infer may reach farther back than 1796, practices inconsistent with the custom, fictions instead of facts, such as in this very case have been admitted to be departures from the custom, have prevailed in the City. When we have evidence of such irregularities in proceedings nominally under the custom, these modern instances of attempts to apply the custom to corporations cease to have the weight, which possibly they might have had, if it could have been shewn, first, that in all other respects during that period it had been the practice to pursue the custom with propriety and regularity; and, secondly, that in these cases against corporations, the attachments had been made effectual, either by submission of the corporations to the process, without its being ever questioned in any Court by their creditors, or by some means of compulsion having been actually used against them.

When we examine the matter a little farther, I think it becomes more and more apparent that the custom does essentially require personal process against a garnishee as the only means of enforcing his obedience. In the special case, at paragraph 54, we are told, that although from the year 1852 down to 1872—that is, within the last thirty years—there were numerous instances in which moneys in the hands of corporations aggregate had *de facto* been attached in the Mayor's Court and judgment signed against the garnishees, and although in many of those cases execution had been actually issued, and the money paid by the garnishee, under that process, yet we are also told that "the process issued has in every instance been in the form of a *capias*" (that is, personal process), "the direction to the serjeant-at-mace being to take the *City Bank* or the *Peninsular and Oriental Steam Navigation Company*, or whatever the corporation might be."

It does, therefore, appear from that paragraph, that, within a period of time so recent as to be of no weight in the case, (to say nothing of the other irregularities which were customary during that period, to which I have already referred,) this process has been used against corporations, and with effect, in this sense, that garnishee corporations have paid money, whatever risks they may have run by it. But so far from any attempt being made to

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claim the right of enforcing that process against corporations, even during that period, by any other than personal process, the uniform practice has been to issue a *capias*, assuming that the body of the *City Bank*, or that the body of the *Peninsular and Oriental Steam Navigation Company*, could be taken, and, I suppose, put into prison or detained in custody in some manner unexplained. Nothing can more strongly shew, that no other mode of making this attachment compulsory upon any garnishee was known.

There is another statement, in the 28th paragraph of the special case, which is material upon this subject; and that is, that whenever a garnishee chose to appear, upon his appearance he had a right, (as of course,) to say that he owed nothing to the Defendant and had no goods of the Defendant's in his hands. But if he chose, for this or any other purpose, to appear, then before he could be heard, or could plead at all, or make his defence, "he was obliged to find sureties to be present from Court to Court until the plea of foreign attachment should be ended; otherwise, he was committed to prison." Except on compliance with that condition, the garnishee would not be allowed to make his defence. How can a corporation be present from Court to Court? It is said, "By attorney." But if the object is to have the means of committing him to prison, if he does not obey the process, I apprehend that the presence of an attorney would be of exceedingly little value. Not only was he to give security to be present from Court to Court, but "otherwise he was committed to prison." How could a corporation be committed to prison? The sureties he gave (if he gave sureties) were not that he should pay the amount if the issues were found against him, but that he should be present in the body from Court to Court until the plea of foreign attachment was determined; not present by his attorney, but "present *in the body*;" that his body should be taken, if he was guilty of disobedience to the lawful orders of the Court.

That this is an accurate statement, is clear from several of the ancient authorities set forth in the printed case. There is a case which arose on *habeas corpus* in 1443, *Welles' Case* (1), and by the return it appears, after stating the preliminary pro-

(1) Rolls and Memoranda (A.D. 1443) A. 70, M. 5.

ceedings, that goods in the hands of *Welles* belonging to the Defendant in the action were adjudged to be delivered according to the custom of the City to the Plaintiff in the action, and that "the said *John Welles*" (the garnishee) "named in the same writ, for that he was summoned and came not according to the custom of the said City, by default was condemned by the foreign attachment aforesaid;" "whereupon, according to the custom of the City," at the instance of the Plaintiff, "one of the serjeants-at-mace was commanded to attach *by his body* the said *John Welles*, and cause him to be led to the prison of the Lord the King," "there to remain until the said *John Welles* should satisfy the said Plaintiff of the said sum." It was not to distrain his goods, not to levy anything upon them, but to attach him by his body.

We have also examples of the form of security given, when submission to the Court was not made. There is a precedent of the year 1680, where *Ayliffe* (1) was the name of the garnishee. *Hayden* the Defendant was attached by £20 in the hands of *Ayliffe*, and *Ayliffe*, at the suit of the Plaintiff, was warned to appear. He appeared and found sureties to have his body from Court to Court until the end of the plea" "*ad habendum corpus dicti Thomæ Ayliffe in attachiamento, et sic deinceps de curia in curiam, usque ad finem placiti illius.*" In the case of *Gooch* v. *Loveland* (2), the proceedings were similar, and the party did not produce his body according to the engagement. *Francis Haddon* the garnishee had given as sureties persons named *Edney* and *Lench*. The security was "to have, &c." (and no doubt that "&c." means "his body") "from Court to Court until the end of that plea, &c., according to the custom." Afterwards the garnishee, *Francis Haddon*, "by and at the instance of his mainpernours aforesaid," (that is his sureties,) "was committed to the prison of the Lord the King in the counter of the *Poultry* of *London*, under the custody of us the aforesaid sheriffs, there to remain until the end of the plea of the attachment aforesaid."

These examples shew that the custom was, if the garnishee did not appear, to commit him to prison; and, if he did appear, and

(1) Returns to Writs, City Archives, vol. iii. f. 20 b.

(2) Returns to Writs, City Archives, vol. i. f. 139 b.

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time was given for farther proceedings, to take security for his personal appearance from Court to Court, and if he made any subsequent default, then also to commit him to prison. Commitment to prison is the only way in which, according to the whole course of these precedents, and the findings in the present special case, the garnishee could be compelled to obey; and that, as I have already said, rests upon an intelligible principle. Nothing more need be said to shew that such a custom cannot be applied to a corporation, because it fails in this essential and indispensable point, that it cannot, as against a corporation, have the force of compulsion in law.

Upon these grounds, I think, that the judgments under appeal are right, and must be affirmed, and I so move your Lordships.

LORD BLACKBURN:—

My Lords, I have come to the same conclusion.

I think it necessary to observe, in the first place, upon the way in which the point is raised, in order that it may be seen what the House has really to decide. The declaration in prohibition is on this ground; the Plaintiffs in prohibition allege, and truly allege, that they are a body corporate, a corporation aggregate, and they assert that "according to the law of this kingdom of *England*, the Plaintiffs as such corporation as aforesaid are not liable to any process of foreign attachment issuing out of the Lord Mayor's Court," yet the proceedings are taken to enforce a foreign attachment against them, being a body corporate, which the other party threatens to do "by *fieri facias* and otherwise against the goods of the Plaintiffs." Such is the declaration in prohibition.

That is met by these pleas. The first plea, denying that they are a corporation is, of course, a mere idle plea. The second says that "the Plaintiffs, as such corporation, were and are liable to the said process, and the said Court had, and has, power and authority to attach moneys, goods, and effects of the Defendant in the said suit." That is a traverse, raising the question whether the custom does apply to a corporation or not, and that will be of course the main question in the case as raised here. But besides that, the Defendants pleaded a special plea, which would be per-

fectly good if it had been applied to an ordinary garnishee. They plead this custom of foreign attachment in the City, setting it out, as it has been certified often enough, the words of the old certificate being, "If any person found in the City is indebted," and so on. The word "person" might include a corporation, or it might not, that is not expressed, and I shall have to say a word or two about that by-and-bye.

But then they proceed to state the facts, and there is this material averment, "At the petition of the said *Sarah Griessiell* then and there made to such Court by her said attorney, and by virtue of such plaint, it was then and there commanded by the said Court to one of the serjeants-of-mace of the said mayor, and a minister of such Court, that he, according to such custom, should summon the said *Thomas Griessiell* to appear at the same Court, so holden before the mayor and aldermen of the said City, to answer the said *Sarah Griessiell* in the plea in such plaint specified, and that the said serjeant-at-mace should return and certify what he should do by virtue of the said precept, that afterwards at the same Court the said serjeant-at-mace, according to such custom, returned and certified to the same Court that the said *Thomas Griessiell* had nothing within the said City, or the liberties thereof, whereby he could be summoned, nor was he to be found within the same, and thereupon the said *Thomas Griessiell* was then and there at the same Court solemnly called, and did not appear." That is the form of the averment which has been, I think, in all the pleas of foreign attachment since foreign attachment was first pleaded (which is now for 500 years and more), and imperfect as is the security that the Defendant should know of the foreign attachment, and that his moneys in the hands of his debtor should not be taken away without notice, there is *some* security there given, namely, that the serjeant-at-mace, a responsible officer, should have tried to find the Defendant, that he should not have been able to find him, and that he should not have been able to find anything by which he could summon him. It gives an imperfect security perhaps, but it gives some security that his goods shall not be taken behind his back, and that security it is, and I apprehend that security alone, which has prevented the custom of foreign attachment from being held to

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be utterly unreasonable and void as against a Defendant; the reason being that this does give some security, that except in cases where the Defendant having been within the City has absconded, leaving nobody to look out for him, and has moreover left no property within the City, that is, not in the hands of another—except in such cases he shall have an opportunity of appearing before the Plaintiffs come upon his debtor at all. That is clearly material, and indeed a necessary averment in the plea.

There was a demurrer to that plea, and upon demurrer the averment must be taken to be true. The object of the demurrer, no doubt, was to raise the question for the Judges of the Common Pleas Division to determine upon what they took judicial notice of, namely, the custom of foreign attachment, whether or no the custom of foreign attachment did apply to a corporation aggregate as garnishee. There is considerable difficulty in saying how that question could be properly raised as the case then stood, I do not say that it might not be, but I say there is very considerable difficulty about it, for although the Courts do know and take judicial notice of a great many of the customs of the City of *London*, and of the custom of foreign attachment in particular, there might be a good deal of dispute as to whether it was not possible that some customs might exist of which the Courts had not yet taken judicial notice, and when the case went up to the Court of Appeal on the demurrer, at first, I understand (it does not appear very distinctly on the papers before us how it was) that the late Lord Justice *Mellish* pointed that out, and said that to raise the real question before the Court, it was necessary that the issue of fact, particularly the issue upon the second plea, should be ascertained, or if not necessary, at all events highly desirable that that should be done before they decided the question, and I think he was perfectly right in that. Accordingly it was arranged and agreed that that should be done, and that then the argument should be resumed, and there was an order of reference made to have the matter settled upon the terms which are there mentioned by an arbitrator. That has been done and a special case has been stated. Now it is not expressly stated upon that order what arrangement was made, but it is obvious enough, I think, that the spirit of what was then agreed to was this: that if there should

be any difficulty upon the demurrer to the plea and upon the plea, both should be amended. They would have been amended of course in every particular that was requisite in order to raise the real question, and if there should be any difficulty as to that, we have to look to the facts as found upon the special case, to see what the custom really was, and accordingly, without any attempt to shrink from it, it has been so argued before us. I do not enter into the inquiry of what amendments precisely might have been required upon the demurrer to the plea, or whether the question was rightly raised upon the demurrer to the plea, or not. I think that is all put aside by this arrangement; and, in fact, the point for your Lordships really to decide, taking the whole matter together, is this, is the custom really established or not? The issue of law would follow the issue of fact, if I may use that phrase. Then are the issues of fact to be found for the Defendant or not?

Now, my Lords, when the special case comes to be examined, it appears that upon that particular part of the plea which alleged, what certainly is an essential part of the custom, and was an essential part of the plea, namely, that there had been that kind of notice given to the Defendant, or rather that security that the Defendant should hear of the proceedings, unless he had run away, or absconded, which would be implied by the serjeant-at-mace trying to find him, and returning *non est inventus*, (and if the serjeant-at-mace returned *non est inventus*, unless it was true, he would be responsible for having made a false return,) upon this essential part of the custom and of the plea it turned out that that had never taken place at all. It appears that a very improper practice has existed for a long while in the City of *London*. They have been content to write down that these things have been done when they have not been done at all. I will not inquire with what object that was done, or how it came to be done, farther than to say this; whatever may be the case, if a garnishee is defending himself, I cannot doubt at all that the Court of Appeal was perfectly right in saying that that question being raised here, there was no technical estoppel or objection of any sort, and that the point being raised by the garnishee it is conclusive. The plea as pleaded is not proved in an essential part, and

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consequently the Defendant is entitled to judgment. But then that turns solely upon the particular instance in which it has happened. It does not decide the general question as to the custom.

Now, upon the general question there was an attempt made to argue thus. Mr. *Benjamin*, if I understood him rightly, said, as it is shewn that in the City of *London* the authorities have for a long while been abusing this process (for that is what it comes to) therefore the custom must be considered as forfeited and at an end. No authority was cited for such a proposition, and I know of none. There are some authorities for saying that when a body corporate has abused its franchises, those franchises may at the instance of the Crown be seized and treated as forfeited for the abuse; but I have never heard, nor am I aware of any authority for saying, that the fact that many people have abused and made an ill-use of this custom of foreign attachment, and have used it for purposes for which it was not intended, and have probably done a good deal of mischief in so doing; that that fact is to prevent others, innocent persons, from using the custom, if they use it properly afterwards. I do not think, my Lords, there is any ground for saying that.

Then we come to the real question which was intended to be raised, namely, does this custom apply to a corporation aggregate as garnishee? The Judges of the Common Pleas Division in giving their judgment, render reasons which are not to my mind satisfactory, that led them to the conclusion that a corporation aggregate could not be a Defendant in a Court. I do not think it necessary to inquire into that farther than to say, that I do not see any reason why a corporation aggregate cannot be a Defendant in a Court. I think the decision of the Court of Error in the case of —— v. *The Hamburg Company* (1) in the reign of *Charles* II., was a decision that a corporation aggregate could be a Defendant. I do not see why it should not. However, it is not necessary now to decide that.

My Lords, assuming it to be convenient and desirable that a natural person, being a debtor to another, should be capable of being treated as a garnishee and having the other's goods attached

(1) 1 Mod. 212.

in his hands, I do not see that there is anything, in the reason or sense of the thing, why a corporation aggregate being a debtor, should not be treated in the same way. If it be convenient and desirable, for instance, that Messrs. *Smith Payne & Smith* the bankers, being natural persons, should have balances in their hands attachable, in order to force their customers to come in, it is equally natural and equally reasonable that the *London Joint Stock Banking Company*, although a corporation, should also be subject to the same liability. But that is not the question. Customs must be immemorial customs; we must see whether the custom has existed from time immemorial. Be it that we are satisfied that the custom would be as good when applied to another subject as to one in which it has existed, we cannot establish that. The Legislature might do so if it pleased, but nobody else can.

Therefore the question comes to be; is the custom here applicable to a corporation aggregate? Two objections are made to that; they are real and substantial objections, upon which I think the whole turns. The garnishee, if he is to be obliged to pay the money, must be discharged from paying it to his creditor. Now the garnishee cannot, according to the authorities, or to reason, set himself free towards his creditor by making any voluntary payment: it must be a compulsory payment; a payment under compulsion of law or else he is not discharged. That brings us to the question, can a corporation aggregate be compelled to pay money in this way? The other way of putting it (the way in which Mr. *Harrison* put it, which did not strike me at first), really involves the same question. It is of the essence of justice that the garnishee who is called upon to pay for a person, money which is alleged to be due from himself to that person, should have an opportunity of saying "I do not owe the money at all," and should be allowed to plead *nil habet*. A garnishee who is a natural person, can, according to the custom of the City of *London*, come in and, giving special bail or rendering himself, plead *nil habet*. He is allowed to plead that, and to say "I owe nothing." Can a corporation aggregate do that? That comes round to nearly the same question as this; are the customary processes of the Court of the City such as to allow a corporation aggregate being a garnishee, to come in and plead *nil habet?* If

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not any custom which attached to a corporation would be in itself utterly unreasonable and void, and could not be enforced.

Now, upon that, my Lords, the two questions which come before us are really nearly the same in point of fact. I can hardly call it fact; it is a mixture of law which the Courts take notice of, and matters proved by old records, and one thing and another; it is therefore a mixture of law and fact: still it comes to be a question, is the process of the Appellants by which they enforce obedience to their orders upon foreign attachment, one which is applicable to a corporation? It was argued, or endeavoured to be argued, that there was something inherent in a Court which enabled it when it made an order to enforce that order. Where it is a Common Law order, you can enforce the order by the Common Law processes. Where it is a thing which would not be done at Common Law, but owes its validity to custom, the rule is that it can only be enforced by customary processes. Now, if it were established as a fact (if it could be), that corporations aggregate had been treated as garnishees from early times, so as to establish that they have been from time immemorial treated as garnishees, according to this custom, I should not hesitate to draw the inference that there must have been a process by which they were forced to obey. The custom could not have been applied to them, and they could not have been treated as garnishees from a time to which the memory of man runs not to the contrary, unless there had been some process or other by which corporations aggregate could be compelled to obey a warning given to them, or an order made upon them as garnishees. If it had been established that that had been done, I should draw at once the conclusion that there was such a process. Or, if, on the other hand, it was shewn as a matter of antiquarian knowledge, or in one way or other made out that there was some process applicable to a natural person—an individual—who was a garnishee, by which he could be compelled to pay, other than by taking his person, if it could be shewn that there was some means by which he could be compelled to obey an order, or have his goods taken, other than a *fi. fa.* against him, it would go very far,—I do not say that it would go the whole way, but it would go very far indeed, to make me believe that corporations aggregate which could have

it enforced against them by that kind of process, might also be garnishees. But when one comes to look at this special case, and at all the authorities which have been cited, one finds that neither of those propositions has been made out at all. In the case itself it is stated, and truly stated, "The garnishee" "if he desired to dispute the debt alleged to be due from him to the Defendant needed to appear. His appearance however, was merely for his own protection. Want of appearance on his part did not, as did want of appearance by the Defendant in the original action, prevent the Plaintiff from getting any farther. From the earliest period, if the garnishee did not appear final judgment went against him by default, with the same consequences as ensued upon judgment after appearance and verdict. Accordingly there is no trace of any process, whether in the nature of *distringas* or *capias*, or otherwise, for the purpose of compelling the garnishee to appear. If he chose to appear, he was obliged to find sureties to be present from Court to Court until the plea of foreign attachment should be ended, otherwise he was committed to prison." Could a corporation aggregate do that? Could a corporation aggregate "find sureties to be present from Court to Court?" Or could a corporation aggregate, if it did not find the sureties, be "committed to prison?" Upon the face of the thing, the statement is enough to shew that it could not be so; and consequently it seems to be very plain upon that statement that a corporation aggregate could not come in and plead *nil habet*, because it could neither give the sureties nor go to prison, nor give special bail to render the person to prison which the custom required, and that would seem to go very far to shew that the custom could not be applicable to a corporation aggregate.

Then, my Lords, the special case proceeds to say that "in the great majority of instances the garnishee when judgment was given against him handed over the money or goods attached to the serjeant-at-mace without actual compulsion, and the serjeant-at-mace thereupon handed the same to the Plaintiff. If the money or goods were not forthcoming, the garnishee might be and ordinarily was arrested and committed to prison. Whether a process in the nature of a *fi. fa.* was also available" (it proceeds to say) "is a matter in dispute," and which, of course, the Court

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has to determine. But I pause to say that that shews that in the ordinary course, at least, the customary process to compel obedience was one which was not applicable to a corporation aggregate, and such a corporation, therefore, one might say, could not be within the custom, because if it made the payment, it would be a payment not made under compulsion of law, and which, therefore, would not be good as against its creditor the Defendant.

Now, the first thing one naturally inquires is what I mentioned before, viz., whether there is any ground for saying that corporations were in fact treated as garnishees from early times. If so I should infer that there must have been some process against them. No corporation seems ever to have been treated as a garnishee, as far as can be found, until, I think, the year 1796, and then for a considerable period there are entries from which it appears that foreign attachments had been commenced against corporations aggregate as garnishees; but there are no instances of their having been acted upon or obeyed until comparatively recent times. I think the earliest was 1817; it may be as early as that, but most of them were after 1830. Now we know perfectly well that before 1830 the Petitioners in the city of *London*, or I may say the City of *London*, had been endeavouring to extend the custom of foreign attachment to a degree which went outrageously beyond what was justified. Their efforts so to do were hardly put an end to, finally, until the decision in *Cox* v. *The Mayor of London* (1). In that case they boldly contended, and the Recorder certified, that it was the custom of the City to sue any person, whether he was in the City or out of the City, for any debt, whether it had accrued within the City or out of the City, and for that purpose to attach any garnishee, whether resident in the City or not resident in the City, if they could catch him within the City, so that the serjeant-at-mace could give him a warning. This House held—and even if it were not the decision of this House I should say no one could read the elaborate opinion given by the late Mr. Justice *Willes*, which I myself concurred in, as one of the summoned Judges, without being convinced that this was a complete usurpation. What I have now to deal with is only

(1) Law Rep. 2 H. L. 239.

the point that the system of usurpation which was stopped then had begun as early as 1830 or earlier. There are very clear traces of an attempt of the kind having been made in that case which was referred to, *Wetter* v. *Rucker* (1), where it appears that a Swiss merchant sued an Italian merchant in the City Court of *London* and, by what looks extremely like collusion, attached a debt in the hands of a common factor. The decision which was then come to, at least the only decision which is material to the present case, was, that payment under that attachment, under the circumstances in which it was made, was not payment by compulsion, and that no other payment would discharge the garnishee. It is therefore a very important authority for the proposition with which I first started, that to make the custom good, it must be shewn that there is some process by which the garnishee could be compelled to pay.

I think, therefore, that corporations are not shewn to be garnishees, so as to lead to the inference that there must have been some process against them. Has there been, in fact, shewn to have been any process against individuals, that is to say natural persons, who are garnishees which could be applicable to a corporation aggregate? I have already said that I think it is essential to shew that there is a customary process to enforce an order, which only rests upon the custom itself, a process according to the custom. Has there been anything of the kind? I need not mention all the cases that were referred to, because, as they went on, they were all distinguished from this. The only case which is applicable, if that is applicable, is the case of *Gascoyne* v. *Penyke* (2). That was a peculiar case undoubtedly, in which it is difficult to say exactly what the suit was, but the important part of it as regards this case was that after the garnishee had made final default, judgment was given against him. "Whereupon," says the Recorder, "it is considered that £50 of the moneys aforesaid defended in the hands of the aforesaid *John Marian*," *John Marian* was the garnishee—"be levied of the goods and chattels of the same *John Marian* if he have whereof, &c., and be delivered to the same *Torellus* by security, according to the

(1) 1 Brod. & B. 491.
(2) Rolls and Memoranda (A.D. 1374) A. 19, Roll 19.

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custom of the City aforesaid, &c.; and if the same *John Marian* have nothing whereof the moneys aforesaid can be levied, that then the same *John Marian* be taken and committed to prison until he shall have delivered here in Court the moneys aforesaid," so that in that case no doubt the Court of the City did take upon itself to order a *fi. fa.*, and in the event of no goods being found a *ca. sa.*, in the same breath, and if such a thing as was then done had been done since, and that practice had been followed, so that you could consider whether it was good and reasonable in itself or not, it would be another matter, but to say that such an anomalous and peculiar thing as that should be considered as established, as being part of the custom, because once and once only, rather more than 500 years ago, it was done and has never been acted upon since, seems to me impossible. We are to find the matters of fact as to the custom of the City by the terms of the order of reference upon the special case. I do not see how one could find as a fact that it was part of the custom of the City to pursue this very anomalous course, which once, and once only, appears to have been pursued 500 years ago. As I said before, the question seems to me to come round to this: Can a corporation aggregate be allowed to appear and plead *nil habet?* If it be so, then a corporation aggregate can only do so upon the terms of giving special bail that the corporation aggregate shall come in person and attend the Court, and if not, shall be kept in custody in person; the corporation aggregate cannot come in and plead *nil habet*, and the custom, if it applied to such a corporation, would be utterly unreasonable and void. If the corporation aggregate is to make a payment, that payment will not be good as against the debtor unless the payment is made by compulsion of law, and that comes round to be unless there can be shewn to be some customary process applicable to a corporation aggregate, by which it could be compelled to pay. I have already stated, my Lords, that in my opinion, neither of these things is made out, and consequently I think the judgment should be, as it was given in the Court of Appeal, the judgment of the Common Pleas Division should be affirmed, and this appeal dismissed with costs, without deciding any particular questions as to the special demurrers or causes of demurrer upon the plea, because, as I apprehend, it is taken by

arrangement between the parties that the plea demurred to is to be taken as amended so as to raise the question, and that the real question is to be decided upon the facts as found in the special case. Taking that view of the case, I cannot at all doubt that we ought to agree with the judgment proposed by my noble and learned friend upon the woolsack.

LORD WATSON:—

My Lords, the details of this somewhat complicated case—I mean complicated as presented to the House at the Bar—have been so fully criticised by my noble and learned friend on the woolsack that I shall content myself with stating very shortly the reasons for which I concur in the judgment which his Lordship proposed.

The only point, as I take it, that the House intends to decide is that raised by the contention of the Appellants to the effect that this custom of the City of *London* with reference to foreign attachment extends to corporations aggregate as garnishees. In considering the merits of that part of the case it is very necessary to keep in view that which has been already referred to by both my noble and learned friends, namely, that it is of the essence of this custom that execution may follow upon the order directed to the garnishee, in the event of his not obeying that order and failing to hand over the goods of the Defendant, or to pay the money of the Defendant to the Plaintiff. That is necessary, because the Courts of Law have held that, unless he so deliver or pay under compulsion, he is not discharged. The custom would not be a reasonable one unless it went the length of affording protection to the garnishee when he obeys the order of the Court.

Now, my Lords, the older certificates and the treatises upon City law, certainly leave the question open whether corporations are "persons," within the meaning of these laws and those certificates. The word "person" may be extended to legal persons created by statute or by charter, as well as to individuals, and the terms of these documents are not upon the face of them conclusive against the custom or the practice contended for by the Appellants. But an examination of these and the older evidence which we have in the present case, I think clearly shews, in the absence of proof

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to the contrary, to which I shall shortly refer, that the custom therein set forth was not applicable to corporations aggregate. It is quite sufficient for that purpose to refer to the two points which have been already noticed; in the first place, if a garnishee desires to deny his liability as to goods or debt, or, in other words, to plead *nil habet*, the only course of procedure open to him for the purpose of vindicating his rights, was a course of proceeding entirely inapplicable to the case of a corporation. In the second place, I do not think it necessary to go farther than the finding of the case, to the effect that if the garnishee did not pay the money or hand over the goods, the old practice was that the serjeant-at-mace arrested him without any writ of *capias* or warrant—it is not necessary to go farther than that in order to shew that the process of compulsion under which alone a garnishee could safely pay, was a process of compulsion which was quite inappropriate in the case of a corporation aggregate.

My Lords, it might no doubt, notwithstanding the inferences that are derived from these facts, be open to the Appellants to shew that in point of fact corporations were brought within the custom, and that in point of fact execution proceeded against them, appropriate to their personal character as legal persons only. But on referring to the evidence I think it fails, not only in point of time but in point of substance. You have certainly the instances between 1796 and 1817; and, again, a larger practice and more extended custom in recent times, owing to the passing of an Act which enabled corporations to create themselves in the year 1844. But, my Lords, the earlier records shew a defective practice; there was no compulsion. If payments were made, which is not very satisfactorily shewn, by the garnishee, or goods delivered, in those cases it was not under compulsion. A great many of them were withdrawn. And when we come down to more recent times, the only attempt at compulsion which was made by the Court of the Lord Mayor was by issuing a writ equivalent to a writ of *capias*, a proceeding which, as against a corporation garnishee, could obviously have no compulsory force. It therefore appears to me that the attempt to set up this custom as against a corporation aggregate has entirely failed.

But then it was pressed upon your Lordships that this custom

might be extended to corporations aggregate, and that, as it was put by Mr. *Webster* in his argument for the Appellants, execution appropriate to corporations might be found within the Court. I do not doubt that it may be so, but we are here determining, not what may be done, but what has been done: not how this process could be extended to corporations, but whether a custom has existed which does include corporations aggregate.

My Lords, it is not a case, as it was put in argument by the learned Attorney-General, of the creation by law of some new "person" somewhat similar in character to "persons" formerly existing. I offer no opinion as to whether such "persons" would or would not fall within it; but that is not the position of the argument in the present case. Corporations aggregate have existed from a very early period—at least from 1587 downwards. We have in the case before us materials shewing that, from that date, individual officers of corporations were made garnishees. Therefore the very same evidence in this case which goes to prove that a custom existed by which individuals were made garnishees, also goes to establish that corporations aggregate in ancient times, and down to a very recent time, enjoyed an immunity from any attempt to bring them within the custom. And, my Lords, it appears to me that to give effect to the argument which was pressed upon us on this point of the case, would be simply to repeal that exemption, and for the first time legally to subject corporations to the operation of this custom by introducing a mode of enforcing the custom which has never been practised from the earliest times, and not even down to the present time.

Therefore, my Lords, I entirely concur in the views of this case which have already been expressed.

Order under appeal affirmed; and appeal dismissed, with costs.

Lords' Journals, 1st April, 1881.

Solicitor for Appellants: *Sir T. J. Nelson.*
Solicitors for Respondents: *Clarke, Rawlings, & Clarke.*

[HOUSE OF LORDS.]

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Feb. 18, 24, 25, 28; *March* 1, 8; *April* 7.

THE REV. ALEXANDER H. MACKONOCHIE APPELLANT;

AND

THE RIGHT HON. LORD PENZANCE AND JOHN MARTIN . . . . . } RESPONDENTS.

Ecclesiastical Court—Prohibition—Definitive Sentence—Monition—Subsequent Enforcement of the Monition.

In 1874 a suit was instituted by letters of request in the Arches Court, according to the provisions of the 3 & 4 Vict. c. 86 (the *Church Discipline Act*) against a clerk for unlawful practices in the performance of divine service. A sentence of suspension *ab officio* for six weeks was pronounced against him, and he was "monished" not to repeat the practices. He did repeat them, and was again admonished. He continued to repeat them, was twice summoned before the Court to answer, but did not appear; and in June, 1878, the Dean of the Arches "pronounced, decreed, and declared" that the acts alleged to have been done by the clerk, had been fully proved, "and that in so doing he had repeated the offences alleged against him in the articles exhibited against him in this suit," and had thereby disobeyed and contravened the monitions served upon him. "For which disobedience the Judge did pronounce him to have been guilty of contumacy. And for the conduct aforesaid the Judge did farther decree and declare" that he should be suspended *ab officio et beneficio* for three years:—

Held, that this was a matter of ecclesiastical procedure alone, and was not, therefore, the subject of a proceeding in prohibition.

The suspension was only a step in the proceedings which had been regularly instituted in 1874, and was in itself perfectly regular.

Per LORD BLACKBURN:—The temporal Court, proceeding in prohibition, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters.

Martin v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2) approved.

ON the 1st of June, 1874, the Appellant was cited to appear in the Arches Court of *Canterbury* in a suit instituted upon letters of request from the Bishop of *London*, and promoted by Mr. *Martin*, of 2, *New Square, Lincoln's Inn*, within the diocese, according to the provisions of the 3 & 4 Vict. c. 86. On the 7th of December, 1874, Sir *R. Phillimore*, then Dean of the Arches, pronounced a decree in the suit declaring the articles charged to have been

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301.

proved, and ordering the Appellant to be suspended *ab officio* for the space of six weeks, and he was also then and there admonished to abstain in future from the practices complained of. There was an appeal against this decree (the execution of which was thereon suspended) to Her Majesty in Council, but the appeal was abandoned before hearing. The decree accordingly revived, and on the 12th of June, 1875, the Appellant was served with a monition in accordance with the decree. The decree with the monition was duly served on the Appellant, but no farther proceedings were taken in the suit till the 18th of March, 1878, when a notice of motion was filed and duly served upon the Appellant, alleging him to have been guilty of renewing the practices from which he had been admonished to abstain, and therefore asking that the monition might be enforced. The hearing on this motion was appointed for the 23rd of March, 1878, but the Appellant, though duly called, did not appear. The Court then pronounced that he had been guilty of continuing the condemned practices, and farther admonished him to refrain therefrom. On the 29th of March, 1878, the farther monition was accordingly served on the Appellant, who did not appear thereto, but did continue the condemned practices. A notice of motion for the enforcement of the monition was served on the Appellant, who was required to appear thereto on the 11th of May, 1878. Though duly called in Court he did not appear, and the matters alleged in the petition having been proved, Lord *Penzance*, who had, since the date of the first decree, been appointed Dean of the Arches, pronounced judgment declaring the allegations of disobedience to the monition proved, and the Appellant to have been guilty of contumacy, and for such misconduct the Court declared that the Appellant be suspended for the space of three years, from the time of publishing the suspension in the Church of *St. Alban's, ab officio et beneficio.*

On the 5th of June the Queen's Bench Division granted a rule nisi for a prohibition, which was argued on the 27th and 28th of June, and, on August the 8th, the rule, in accordance with the judgments of Lord Chief Justice *Cockburn* and Mr. Justice *Mellor* (*diss.* Mr. Justice *Lush*) was made absolute (1). The case was taken to the Court of Appeal, where, on the 28th of June, 1879,

(1) 3 Q. B. D. 730.

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Lord *Coleridge* and Lords Justices *James* and *Thesiger* held that the judgment of the Queen's Bench Division must be reversed, Lords Justices *Brett* and *Cotton* dissenting (1). This appeal was then brought.

Mr. *Arthur Charles*, Q.C., and Dr. *W. G. F. Phillimore*, for the Appellant:—

The objection to what has been done in this case is not merely to the form of the proceeding, which might only be the subject of an appeal, but is to the very jurisdiction of the Arches Court, the lawful limits of which have been exceeded. The only proper remedy therefore is by a proceeding in prohibition. The title of the High Court of Justice to restrain all inferior Courts where they act in excess of their jurisdiction cannot be doubted, and this is a case in which that cause for prohibition actually exists. Two statutes have in fact been disregarded—the 53 Geo. 3, c. 127, and the 3 & 4 Vict. c. 86. The former made a change in the old law. Instead of excommunication it provided that a sentence of contumacy should be pronounced. The contumacy would then, in a regular way, be signified into Chancery on which the power of Chancery would be set in motion, and imprisonment might follow, and obedience in that way enforced. That course had not been pursued in this case, but a totally different one, a punishment, that of suspension *a beneficio*, had been substituted for it, without any statutory authority giving warrant for the change. That was an excess of jurisdiction, and was ground for a prohibition. Then again as to another statute, the *Church Discipline Act*, 3 & 4 Vict. c. 86. The proceeding here was plainly and distinctly a criminal suit. That being so it fell within the provisions of sect. 23 of that statute, by which no suit except in conformity with its provisions should be instituted. A suit had been instituted in conformity therewith; but that suit had come to an end in December, 1874, when a definitive sentence had been pronounced. To that sentence a monition or warning had been added—but nearly four years afterwards, namely, in June, 1878, without any new proceeding under the statute, a sentence of suspension *a beneficio* had been pronounced. That was entirely

(1) 4 Q. B. D 697.

beyond the jurisdiction of the Court. The sentence itself shewed it to be so, for it declared that the Appellant had done certain acts, and that in so doing them he had "repeated the offences which were alleged against him in certain of the articles which were exhibited against him." This was in effect to say that he had been guilty of anew committing the offences which had been the subject of the former suit. If so, he had again made himself liable to be proceeded against under the same statute. But that must be by a fresh suit. He had been already punished for what he had done before 1874, he could not be again punished for the same things—punished a second time for his first offence, that was contrary to the spirit and principles of the English law. But if it was said that he had been guilty of fresh acts of ecclesiastical impropriety, the very phrase that they were fresh acts shewed that there must be a fresh proceeding against him in respect of them. In such fresh proceeding he would have, as all other persons had, the opportunity of denying the alleged acts, and of requiring them to be strictly proved, or of shewing that what he was charged with did not bear the character of ecclesiastical offences, and did not make him subject to punishment. To give a new, and a much heavier punishment than before, and to give it without a new charge, a new investigation, and a new opportunity of defence, was to violate the first principles of English law. And this very serious and alarming consequence was the necessary result of such a course—it made an accused person liable to be punished not only twice for the same offence, but, in reality, subjected him for the whole course of his life to renewed punishments, renewable too from time to time, because he had once been declared subject to punishment. And that, too, although the first offence had had a particular punishment affixed to it, and that punishment, formally declared as a definitive sentence, had been fully undergone.

If it was said that the Appellant had been guilty of contempt or contumacy, the answer was, that the punishment inflicted was not the proper punishment for contempt, but for the ecclesiastical offences which had been alleged as the ground for the suit in 1874. Here the punishment was suspension for a fixed and settled time; but punishment by suspension *ab officio* for con-

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tempt or contumacy could only properly be inflicted as a means of compelling obedience to the authority of the Court. The punishment for contempt or contumacy ought to be capable of being brought to an end by an act of obedience. That was not so here, for no submission could vacate the positive sentence of the Court that the Appellant should be suspended *a beneficio* for the space of three years. The punishment therefore did not bear the character assigned to it, but was one of a wholly different sort, and was not warranted by the statutes.

The very numerous cases and authorities quoted in the Court below, were again referred to. They will be found discussed at large in the judgments.

Sir *Hardinge Giffard*, Q.C., Mr. *Blakesley*, and Mr. *A. L. Smith*, appeared for the Respondent.

THE LORDS did not call on the Respondents' counsel, but took time to consider whether it would be necessary to do so—and finally proceeded to pronounce judgment without hearing them.

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THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the Appellant in this case is a clergyman of the Church of *England*, beneficed in the diocese of *London*, who, in a suit duly instituted in 1874, in the Arches Court of *Canterbury*, by letters of request from the Bishop of *London*, according to the *Church Discipline Act* (3 & 4 Vict. c. 86), was charged with certain offences against the law ecclesiastical, consisting in the introduction of unauthorized ceremonies during the performance of divine service in his church. At the hearing on the 7th December, 1874, Sir *Robert Phillimore*, then Dean of the Arches, held certain of these charges to be proved; and by an interlocutory decree, having the force of a definitive sentence, ordered the Appellant to be suspended *ab officio* for six weeks, and admonished him to abstain for the future from the practices set forth in the articles which were held to have been established. Notice of appeal was given, but was afterwards abandoned; and on its abandonment, a formal instrument of suspension, to be published in the Appellant's church, was drawn up and issued under the

seal of the Court on the 12th June, 1875, by which it was notified that the Appellant had been suspended for six weeks from the discharge and execution of all the functions of his clerical office within the province of *Canterbury*, "under pain of the law and contempt thereof." At the same time (by a separate instrument) a formal monition also under the seal of the Court was issued and served upon the Appellant, by which he was admonished to abstain for the future from the practices set forth in the articles pronounced to have been proved, also "under pain of the law and contempt thereof."

Down to this point the proceedings are now admitted to have been regular and proper according to the course of the Ecclesiastical Courts. In the Queen's Bench Division of the High Court of Justice this was not admitted; on the contrary, it was then contended that it was not competent for the Court of Arches to superadd monition to suspension; and this view, being adopted by the late Lord Chief Justice of *England*, formed part of his reasons for granting a prohibition.

After a lapse of nearly three years, on the 18th March, 1878, a notice of motion in the same cause was filed and served upon the Appellant, charging him with disobedience to the monition of the 12th June, 1875, in the particulars therein set forth, on certain days in each of the years 1875, 1876, 1877, and 1878; and intimating that the Court would be asked on the next Court day to enforce the monition and to condemn the Appellant in costs. A motion pursuant to that notice was made, the Appellant not appearing; and (the alleged instances of disobedience having been proved by affidavit) the Judge of the Arches Court on the 23rd March, 1878, pronounced and declared that the Appellant "had failed to obey the said monition in not having abstained from the following practices, acts, matters, and things" (specifying them); "and that he had continued the said practices, acts, matters, and things;" and admonished him to abstain from them for the future and condemned him in costs. Pursuant to this sentence a farther monition, "under pain of the law and contempt thereof," was issued on the 29th of March, 1878, and served on the Appellant.

On the 18th April, 1878, another notice of motion (similar

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to the former) was filed and served on the Appellant, alleging farther acts of disobedience since the service of the farther monition; and, after motion made, pursuant to this notice (the facts being proved by affidavit, and the Appellant again not appearing), the Court, on the 1st of June, 1878, "pronounced, decreed, and declared," that certain acts alleged to have been done by the Appellant on the 31st March and the 7th April, 1878, in the performance of divine service on those days, were sufficiently proved; "and that in so doing, he had repeated the "offences which were alleged against him in certain of the articles "exhibited against him in this suit, and declared by the Court to "have been sufficiently proved, and farther had therein and thereby "disobeyed and contravened the monition served upon him on the "26th July, 1875, and also the farther monition served upon him "on the 29th March, 1878. For which disobedience the Judge "did pronounce him to have been guilty of contumacy. And "for the conduct aforesaid, the Judge did farther decree and "declare" that he should be suspended *ab officio et beneficio* for three years.

It was contended that this was a sentence of suspension, not for contumacy only, but also for new and substantive offences against the ecclesiastical law. But I cannot hold the finding, that the Appellant had "repeated" some of the offences with which he was originally charged, to be anything more than an introduction to a sentence for contumacy and disobedience to the monitions of the Court. The context of this sentence itself, the prior sentence of the 23rd March, the farther monition, and the notices of motion on which both those sentences were founded, make this, to my mind, clear.

Against publishing, proceeding with, or enforcing this decree of suspension, a rule nisi for a prohibition was obtained by the Appellant from the Queen's Bench Division of the High Court, on the 5th June, 1878; which rule, after argument, was made absolute on the 8th August, 1878—the late Lord Chief Justice and Mr. Justice *Mellor* thinking the case one proper for prohibition, Mr. Justice *Lush* thinking otherwise. The Court of Appeal, on the 28th June, 1879 (by a majority consisting of Lord *Coleridge* and Lords Justices *James* and *Thesiger* against Lords Justices

Brett and *Cotton*), reversed this judgment of the Queen's Bench Division, and discharged the rule for a prohibition. Whether this reversal was right, or not, is the question now before your Lordships. After hearing an elaborate argument from the counsel for the Appellant, for several days, your Lordships were (I believe) all under the impression that the judgment of the Court of Appeal was right; but, in a case in which there had been so much difference of opinion among very learned Judges, you desired to take time more fully to consider the arguments and the authorities cited. The result (so far as I am concerned) has been to confirm my original impression.

It was contended that the sentence of suspension of the 1st June, 1878, was contrary to two statutes of the realm (3 & 4 Vict. c. 86, and 53 Geo. 3, c. 127); and if this could be made out, the prohibition was rightly granted. But, if this is not so, the question resolves itself, simply and entirely, into one of the proper course, practice, and procedure of an Ecclesiastical Court, in a cause of which that Court had proper cognizance, against a person and in a matter properly subject to its jurisdiction. Such a question ought, in my opinion, to be determined in the ecclesiastical, and not (by prohibition or otherwise) in any temporal forum, notwithstanding the fact that, by a sentence of suspension *a beneficio* (which the Ecclesiastical Courts, and those Courts only, have power to pronounce), temporal rights, held by an ecclesiastical tenure, in consideration and upon the condition of the performance of ecclesiastical duties, are necessarily affected. Supposing no statute to intervene, the Ecclesiastical Courts must have jurisdiction to determine questions of this nature; and, if they have jurisdiction, prohibition does not lie to them from the temporal Courts. The remedy (if there be any error in judgment) is by appeal. In point of fact, the Court of Final Appeal in ecclesiastical causes has already three times had before it the very same question which is raised by the Appellant in this case; and has as often decided it adversely to the Appellant's view. Whether those decisions might or might not be open to reconsideration, in any other case, by the Court which pronounced them, they ought, in my opinion, to be treated in the meantime, by this and every other temporal Court, as settling the ecclesias-

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tical law upon the point in controversy, supposing there to be no other law or statute which they contravene.

The argument of the Appellant's counsel from the *Church Discipline Act* (3 & 4 Vict. c. 86), was, that it prohibits, by sect. 23, the "institution" in any Ecclesiastical Court, of "any criminal suit or proceeding against a clerk in holy orders," otherwise than is thereinbefore enacted or provided; that, in this case, the suit against the Appellant, which was instituted in the year 1874 in conformity with that statute, was terminated and exhausted by the interlocutory decree, having the force of a definitive sentence, of the 7th December, 1874; that no subsequent proceeding, to enforce obedience to the monition issued pursuant to that decree, or to punish disobedience thereto, could be taken in the same suit; that every such act of disobedience was a new and substantive ecclesiastical offence, which could only be punished in a new and distinct suit; that no such new suit was instituted in the manner required by the statute; and, consequently, that all the proceedings in 1878, down to and including the sentence of suspension of the 1st June, 1878, were without jurisdiction.

The argument from 53 Geo. 3, c. 127, was, that it provided, instead of excommunication (which had previously been in use, for the purpose of enforcing obedience to the citations and lawful orders, both interlocutory and final, of the Ecclesiastical Courts, and for punishments of contempts in the face of those Courts), a sentence of contumacy, to be pronounced in the like cases, and to be signified after ten days to the King in Chancery, whereupon imprisonment was to follow; and that this statutory method thenceforth became and was the only way of enforcing obedience, or punishing disobedience, to such lawful citations or orders of any Ecclesiastical Court, in cases of contumacy or contempt.

In order to consider the validity of these arguments, (and for that purpose only,) it becomes necessary to ascertain (1.) whether before the statute 3 & 4 Vict. c. 86, a proceeding to enforce obedience to a monition or other order, contained in or issued pursuant to a decree of an Ecclesiastical Court having the force of a definitive sentence, could be taken in the same suit, without the commencement or institution of any new "criminal suit or proceeding:" and (2.) whether, before the 53 Geo. 3, c. 127,

obedience to the lawful citations or orders (interlocutory or final) of an Ecclesiastical Court could be enforced, or disobedience thereto punished, by any ecclesiastical censure other than excommunication, and particularly by suspension? If both these questions ought to be answered in the affirmative, the arguments of the Appellants founded on these two statutes fall to the ground. It is certain that there is nothing, in 3 & 4 Vict. c. 86, to prevent anything being done either before or after sentence in a suit duly instituted in conformity with that Act, which, before the passing of that Act could have been lawfully and competently done in a similar suit, duly instituted. And the proceedings for contumacy, prescribed by 53 Geo. 3, c. 127, are thereby substituted for excommunication only; there is nothing in that Act to take away any power, which an Ecclesiastical Court might previously have possessed, to proceed in like cases by other modes of censure.

The ecclesiastical law, it must always be remembered, even in those proceedings which are called (and in some sense are) criminal and penal, has for its object, not the punishment of individual offenders, but the correction of manners, and the discipline of the Church. "Monition" (which is sometimes itself called an ecclesiastical censure) is described in the books as of a "preparatory" nature: *Oughton, Ordo judiciorum* (1); *i.e.* (as I understand the term) as a warning or command, to be followed in case of disobedience by some coercive sanction. It appears to have been a general (though not an invariable) rule of the canon law, that monition ought to precede suspension or excommunication: *Gibson*, Codex (2). It might be, and in practice it often was, issued (for various purposes) at the beginning, or during the progress, of an ecclesiastical cause; it also might be and sometimes was (as in the present case) the sentence or part of a sentence upon the merits, pronounced at the end of such a cause.

It was not disputed at the bar, that, if issued at the beginning or during the progress of a cause, such a monition might be enforced (by excommunication at all events, or since 53 Geo. 3, c. 127, by the procedure thereby substituted for excommunication) in the same suit, though it might be necessary to cite the party for his contumacy, and in some cases to exhibit articles as to

(1) Vol. i. Tit. 137, Obs. 3. (2) Pages 1046–1048.

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disputed or disputable matters of fact: see *Oughton* (1). I may refer, as an example of such a proceeding during the progress of a cause, to a monition for the payment of alimony *pendente lite*, issued in the case of *Hamerton* v. *Hamerton* (2), "under pain of the law and contempt thereof:" for non-compliance with which, a sentence of contumacy (followed by *significavit*) was pronounced, and in the opinion of Sir *John Nicholl*, would have been rightly pronounced if there had been such non-compliance in fact.

No reason *à priori* can be suggested, why obedience to a monition, issued as part of a decree having the force of a definitive sentence, should not be enforced in the same suit, as well as a monition in any earlier stage. Both the suspension and the monition issued on the 12th June, 1874, pursuant to Sir *Robert Phillimore's* sentence in the present case, conclude (like the interlocutory monition in *Hamerton* v. *Hamerton*) with the words, (admitted to be proper words of style), "under pain of the law and contempt thereof." Why should not this warning in case of disobedience, either to the suspension or to the monition, have the same meaning, and point to the same consequences, whether the sentence be interlocutory or definitive? Why should not the Court have the same power of dealing with disobedience and contumacy in the suit in which the contumacy takes place in the one case as in the other?

If authority on this point had been wanting, I should have thought that the burden of proof would rest upon the Appellant. But there seems to me to be abundant authority. There is a case as early as 1602 in Mr. *Rothery's* return (No. 10, *Astill* v. *Bickles*) in which a clerk against whom a final sentence of deprivation had been pronounced on appeal by the Court of Delegates, continued, notwithstanding, to officiate in the church of which he had been deprived. The same Court of Delegates decreed him to be cited for contempt, and inhibited him from interfering in the premises. In *Trebeck* v. *Keith* (3) (1741–2, of which the facts are stated, from the registry of the Arches Court, in Lord Justice *Thesiger's* judgment in the present case (4)) an interlocutory decree having the force of a definitive sentence was pronounced,

(1) Vol. i. Tit. 31–35.
(2) 1 Hagg. Eccl. Rep. at p. 26.
(3) 2 Atk. 498.
(4) 4 Q. B. D. 720.

finding the offence with which the Defendant was charged (performing divine service without license from the bishop) proved against him, and admonishing him not to do so for the future. He disobeyed the monition; on which the Court, in the same suit, pronounced a sentence of excommunication against him for his contempt, which sentence was followed by *significavit*. Prohibition was then applied for before Lord Chancellor *Hardwicke*, who refused it; saying that "the case was of as great consequence to the good government and discipline of the Church as could possibly happen," and that "it was not necessary for the Ecclesiastical Court to shew that they had rightly proceeded, for, if they had not, there was a remedy by appealing to a higher ecclesiastical jurisdiction." In *Burgess* v. *Burgess* (1) (1804, a case of incest against a layman) Sir *William Scott* pronounced a decree having the force of a definitive sentence, by which he condemned the party in costs, and enjoined a cessation of intercourse; and added (2), "If obedience be not given to this order, excommunication and other consequences will necessarily follow." In *Austen* v. *Duggan* (3) (1822) a layman was, by a like sentence, suspended *ab ingressu ecclesiæ* for one week, and was condemned in costs. The costs were taxed, and a monition for their payment, duly issued and served, was not obeyed. The Court then pronounced the party in contempt for not having obeyed the monition, and directed a *significavit* to issue; which, having afterwards been discharged as irregular, a new monition was prayed for and granted; and, on this being disobeyed, there was a farther sentence of contumacy, also followed by *significavit*. The Judge (Sir *John Nicholl*) said, "The Court is not *functus officio* till it has enforced the execution of its own decree." In *Barnes* v. *Shore* (4) (1846, a suit against a clergyman for officiating in a manner unauthorized by the Book of Common Prayer) the Defendant was, by decree having the force of a definitive sentence, admonished to abstain from offending again in like manner, and was condemned in costs. Sir *Herbert Jenner Fust* said, "Should he be guilty of a repetition of this offence, it will be one, not only against his diocesan, but against the authority of this Court." In the *Bishop of Winchester*

(1) 1 Hagg. Cons. 384.
(2) Ibid. 393.
(3) 1 Addams, 307.
(4) 1 Rob. 382, see p. 399; 15 L. J. (Q.B.) 296.

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v. *Rugg* (1) (1868) Sir *Robert Phillimore*, by a like sentence, formally admonished Mr. *Rugg* to obey the direction of his ordinary (by performing divine service in each of his two churches on every Sunday), and added, "It is right that I should call the serious attention of Mr. *Rugg* to the order of this Court. I am glad to perceive that he has the assistance of an experienced proctor, from whom he may learn (if not otherwise informed) that disobedience to the order of this Court will be attended with the grave penal consequences which the law attaches to the offence of contumacy." The last two cases were later than the *Church Discipline Act;* but they shew what two learned and experienced Judges understood to be familiar law in the Ecclesiastical Courts. No example has been alleged to be found in the books, of the institution of a second suit for the sole purpose of punishing mere contumacy or disobedience to the orders of an Ecclesiastical Court, by a person who was a party to the suit in which such orders were pronounced.

The proposition, therefore, that before the *Church Discipline Act* nothing could be done by any Ecclesiastical Court, without a new suit, to enforce a monition, or other order (whether mandatory or prohibitory), forming part of, or issued pursuant to, a decree having the force of a definitive sentence, is disproved by these authorities; which make it evident, that cases of disobedience to such monitions or orders, might be, and were, dealt with on the footing of contumacy or contempt, in the same suit, by farther monition or inhibition, and (if necessary) by excommunication. In five out of the six cases to which I have referred, every act of contumacy or disobedience would have been, (as much as in the present case,) a new and substantive ecclesiastical offence.

The only question which remains is, whether before 53 Geo. 3, c. 127, there was any law to prevent an Ecclesiastical Court, in the case of a clerk in holy orders, from the use, for similar purposes, of the minor censure or penalty of suspension; suspension (whether *ab officio* only, or also *a beneficio,*) being certainly a less penalty, in the view of the ecclesiastical law, than excommunication. There is no reason or principle, on which such a state of the law can be presumed, unless it is proved. All the

(1) Law Rep. 2 A. & E. 247.

authority which is to be found on the subject is in the opposite direction.

Oughton (1) enumerates, first, those ecclesiastical penalties and censures which are common to clergymen and laymen; and, next, those which are peculiar to the clergy. Among the former are monition (of which he says (2), "*præparatoria est, plerumque præcedens ecclesiasticas censuras*), and excommunication. Among the latter, suspension; of which he says (3), "*post monitionem debitè factam, ecclesiasticam personam ab officio seu beneficio, vel ab utroque, ad tempus excludit.*" As to contumacy (4), he says, that its penalty is "excommunication or suspension;" and "*Crescente contumaciâ, crescere debet et pœna: sed pro primâ contumaciâ potest quis excommunicari.*"

Gibson (5) distinguishes two sorts of suspension; the one (*ab officio aut beneficio*) relating to the clergy alone (as to which he says nothing about any disuse); the other (*ab ingressu ecclesiæ*, which he speaks of as disused in his time) relating "to the laity chiefly." Both of them, he says, "are inflicted for crimes of an inferior nature; viz., such as, in the first case, deserve not deprivation, nor, in the second case, excommunication. Both, in practice at least, are temporary; both are terminated, either at a certain time, when inflicted for such a time, or upon satisfaction given to the Judge, when they are inflicted till something he hath enjoined shall be performed. And, lastly, both (if unduly performed) are attended with farther penalties; that of the clergy with *irregularity*, if they act in the meantime; and that of the laity with excommunication." The phrase, "if unduly performed," is clumsy; but I understand it to mean, if any injunction, which the Judge may have embodied in a decree or order by which any kind of suspension *quousque* has been inflicted, is not duly obeyed.

The author of the Appendix to *Godolphin's* Repertory speaks of suspension as "the proper punishment of an offending clergyman;" *ab officio*, for contumacy in not appearing upon lawful summons; "*a beneficio* for higher crimes." He adds, that, "if a clerk that is suspended *ab officio* shall continue the same by serving his

(1) Obs. on tit. 137.
(2) Vol. i. Tit. 137, Obs. 3.
(3) Vol. i. Tit. 137, Obs. 8.
(4) Vol. i. Tit. 37, Obs. (g) 1.
(5) Codex, 1346, 1347.

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cure, notwithstanding his suspension, then a severer sentence follows;" . . . and, "if a clerk that is suspended *ab officio* shall continue so without submission or seeking to be restored, then he may be suspended *a beneficio* also." In the whole of this passage the author repeats and refers to corresponding statements of the law and practice, made by *Lyndwood*, who was Dean of the Arches in the reign of *Henry* V.; quoting from him two sentences, viz., "*Pro suspenso publicè denuntiatus, si interim immisceat se divinis, secundum sententiam doctorum efficitur irregularis;*" and "*subtrahi debet beneficium, quando sic suspensus est in morâ petendi absolutionem.*" The reference is to the gloss at page 12 of *Lyndwood's* Provinciale; where that writer also says, that suspension *a beneficio* should only be "*ex causâ magnâ;*" but that it is such a cause, "*si suspensus* (i.e., *ab officio*) *contemnat suspensionem.*"

Of the use of suspension to compel appearance, in the case of a clerk in holy orders, there are examples in Mr. *Rothery's* Return: *Hancock* v. *Bomer*, in 1691 (No. 99) and *Jones* v. *Curtis*, in 1705 (No. 119). In the first case of *Harrison* v. *Archbishop of Dublin*, in 1707 (which was brought to the House of Lords, on prohibition, in 1713, and in which this House affirmed the orders of the Courts below, refusing a prohibition), a prebendary of *St. Patrick's Cathedral*, duly summoned to attend the Archbishop's Court of Visitation, and not appearing, was declared contumacious; and the Archbishop, "in due form of law, by sentence, suspended him *ab officio et beneficio* for his contempt" (1). At a later Court of Visitation (1718) the same prebendary was "monished by the Archbishop to extract, within a month, a license to serve cure of souls, and to preach, in the parish of *Saint John*" (a church annexed to his prebend); and, on a subsequent day, *Harrison* having neither "obeyed the monition, nor then appearing, the Archbishop pronounced him contumacious, and sentenced him to be suspended." This sentence, and another pronounced under similar circumstances against another clerk named *Higgins*, were affirmed on appeal by the Court of Delegates (2).

These are not authorities directly applicable to the particular case of suspension for disobedience to a final decree in a criminal suit, having the force of a definitive sentence; but the statute

(1) 2 Brown, P. C. 199. (2) Rothery's Return, Nos. 135 and 136.

53 Geo. 3, c. 127, does not lay down one law as to contumacy for the case of such a final decree, and another for cases of citations and interlocutory orders. These authorities, therefore, are sufficient to reduce the question, whether there is any reason against the exercise, in the case of disobedience to a final decree, of the same powers which can be exercised in case of disobedience to a citation or an interlocutory order, to one not of jurisdiction, but of mere ecclesiastical procedure. And there is at least one distinct precedent on record, (prior to the cases of *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2) before the Judicial Committee of the Privy Council,) of a sentence of suspension *ab officio* affirmed by the Court of Delegates, for disobedience to such a decree. This is *Jones* v. *Jones* (1671), which was brought before the delegates from the Consistory Court of *Bangor* (3). The clerk, who was Defendant and Appellant in that case, was articled for not reading the prayers of the Church in what was alleged to be the proper and accustomed place. Having been, by decree having the force of a definitive sentence, admonished to do so, he appeared in Court and "peremptorily refused to obey the monition." For this the bishop suspended him *ab ingressu ecclesiæ*, and ordered him to shew cause why he should not be suspended *ab officio*. On a later day, not having appeared to shew cause, he was suspended *ab officio*. These orders were affirmed on appeal, both by the Court of Arches, and by the Delegates.

The result appears to me to be, that the Appellant in the present case has failed to shew that the provisions of either of the statutes on which he relies are in any way contravened by the suspension of a clerk in holy orders *ab officio et beneficio*, for contumacy in disobeying a monition, forming part of a decree having the force of a definitive sentence, pronounced against him in a suit regularly instituted under the *Church Discipline Act*, the sentence of suspension being pronounced in the same suit; and that this is nothing more than a question of ecclesiastical procedure. Into any reasons of expediency, either for or against the existence of such a power in the Ecclesiastical Courts, or for or against the exercise of it under circumstances like those of the present case,

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301.
(3) Rothery's Return, No. 63.

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I do not think it would be proper for your Lordships to enter. If the Ecclesiastical Court has not exceeded its jurisdiction, the judgment of the Court of Appeal ought to be affirmed; and, being of that opinion, I now move your Lordships to affirm that judgment, and to dismiss the present appeal with costs.

EARL CAIRNS:—

My Lords, at the close of the arguments,—extremely full and able,—for the Appellant in this case, I was of opinion (as were all your Lordships) that it would be desirable that the case should be adjourned in order that we might have an opportunity of considering carefully the arguments and authorities on which the Appellant rested his case. This opportunity your Lordships have now had; and the result has been, so far as I am concerned, that I am now prepared to say that I think the judgment of the Court of Appeal should be affirmed. I had proposed to myself to state in some detail the reasons which led me to this conclusion. Before, however, doing so, I read over again the judgment of the late Lord Justice *Thesiger*, delivered in the Court of Appeal, and I found there every consideration and ground of judgment which I desired to lay before your Lordships, so fully and so felicitously stated, that I determined to refer your Lordships to his expression of them rather than weaken it by using words of my own.

My Lords, there has not been an earlier opportunity, and there certainly could not be a more significant one, which I could take for recording my deep regret for the loss which this country has sustained in the untimely death of Lord Justice *Thesiger*,—of a Judge who in his short tenure of office had given proofs of a rare excellence and ability, and from whose matured wisdom, had his life been prolonged, the highest advantage to the State might have been anticipated.

My Lords, I agree with the Lord Chancellor that this appeal should be dismissed with costs.

LORD BLACKBURN:—

My Lords, this case has been so thoroughly and exhaustively discussed by the learned Judges below, that we cannot expect to have any new light thrown upon it by the counsel for the Respon-

dents; and, as I believe all your Lordships are of opinion that the judgment of the majority of the Court of Appeal below was right, I see no reason why that opinion should not be declared at once.

The *Church Discipline Act* (3 & 4 Vict. c. 86), provides that no proceedings against a clerk in holy orders for any offence against the laws ecclesiastical shall be instituted otherwise than is in that Act provided. A proceeding against Mr. *Mackonochie* was instituted in strict conformity with the provisions of that Act in 1874; and in strict conformity with the provisions of the 13th section of that Act, the Bishop of *London,* in whose diocese Mr. *Mackonochie's* preferment lies, transmitted the case by letters of request to the Court of Arches, being the Court of Appeal of the province of *Canterbury,* to be there heard and determined according to the law and practice of that Court.

The Court of Arches in December, 1874, decreed that the Defendant had been guilty of certain practices which were offences against the laws ecclesiastical, and pronounced sentence that the Defendant should be suspended *ab officio* for six weeks, and admonished to abstain in future from the practices thereby condemned.

On the 12th of June, 1875, a formal suspension and a formal monition were issued in pursuance of this sentence, and published. The monition, after reciting the sentence of suspension for six weeks, proceeds thus:—"We do therefore hereby authorize, empower, and strictly enjoin and command you jointly and severally, peremptorily to monish, or cause to be monished the said Rev. *Alexander Heriot Mackonochie* (whom we do so monish by the tenor of these presents) to abstain for the future from the practices set forth in such of the said articles or parts thereof as we pronounced to have been proved as aforesaid, that is to say, in the 4th, 5th, 7th, 8th, 9th, 10th, and 12th articles, and in the 11th article, so far only as making the sign of the cross to the congregation is concerned, under pain of the law and contempt thereof; and what you shall do or cause to be done in and about the premises you shall duly certify us, our surrogate, or other competent Judge in this behalf, together with these presents."

So far it is not now disputed that the proceeding was all strictly in pursuance of the law and practice of the Court of Arches. For,

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though the late Chief Justice *Cockburn* was of opinion, as he says (1), that "the monition of Sir *Robert Phillimore* was *ultrà vires* and inoperative," the course of precedents and authorities which had not been brought to the Chief Justice's notice when he pronounced that opinion are so strong that it is now admitted, or, as Lord Justice *Brett* says (2), at all events it is clearly established, that the monition in this form was, according to ecclesiastical law and practice, properly made part of a sentence imposing suspension, and was properly issued.

In 1878, application was made to the Court of Arches, of which Lord *Penzance* had now become the Judge, alleging that the Defendant had, in disobedience to the monition, repeated the condemned practices. After full notice to the Defendant, and full proof by affidavits of the truth of this complaint, and Lord *Penzance* having issued two fresh monitions, which were also disobeyed, the Defendant not appearing, Lord *Penzance* on the 1st of June, 1878, pronounced this order, which I read at length for a reason which I will presently state:—"The Judge, having maturely deliberated, did pronounce, decree, and declare that the proctor for the promoter had sufficiently proved that the Rev. *Alexander Heriot Mackonochie* did on Sunday the 31st day of March, 1878, and on Sunday the 7th day of April, 1878, wear, while officiating in the communion service, the following vestments or things, that is to say, an alb, a chasuble, a stole, and a maniple, and did on such days cause to be said or sung during the performance of the service for the administration of the Holy Communion immediately after the prayer of consecration, and before and during the reception of the elements by the communicants, the words or hymn or prayer commonly known as the Agnus, that is to say, "O Lamb of God, that takest away the sins of the world, have mercy on us," and on both the said days did, when officiating in the performance of divine service and of the communion service, kiss the prayer book or service book, and that in so doing he had repeated the offences against the statute laws, constitutions, and canons of the Established Church of *England* which were alleged against him in certain of the articles exhibited against him in this suit, and declared by the Court to have been sufficiently proved, and farther

(1) 3 Q. B. D. 745. (2) 4 Q. B. D. 744.

had therein and thereby disobeyed and contravened the monition of this Court served upon him on the 26th day of July, 1875, and also the farther monition of this Court served upon him on the 29th day of March, 1878, for which disobedience the Judge did pronounce him to have been guilty of contumacy. And for the conduct aforesaid, the Judge did farther decree and declare that the said Rev. *Alexander Heriot Mackonochie* be suspended, for the space of three years from the time of publishing the suspension for that purpose in the church of the new parish of *St. Alban's, Holborn,* in the county of *Middlesex,* diocese of *London,* and province of *Canterbury,* from all discharge and function of his clerical offices and the execution thereof, that is to say, from preaching the word of God and administering the sacraments, and celebrating all other duties and offices in the said new parish church and parish of *St. Alban's, Holborn,* and elsewhere within the province of *Canterbury,* and from receiving or taking any of the profits or benefits of the vicarage or benefice of the said new parish of *St. Alban's, Holborn,* or of the fruits, tithes, profits, rents, rent-charges, salaries, fees, and other ecclesiastical dues and emoluments whatever belonging or appertaining to the said vicarage or benefice, and did suspend the said Rev. *Alexander Heriot Mackonochie* accordingly, and did condemn him in the costs of this application. And the said Judge did moreover direct that a copy of this decree duly certified be transmitted to the Consistorial Court of *London,* in order that such sequestration or sequestrations may there be issued, or such other steps be taken as the nature of the case and the exigency of the law may appear to require. And did farther direct the said suspension to be published in the said new parish of *St. Alban's, Holborn,* on Sunday, the 16th day of June instant," and assigned *Moore* to certify the same in the registry of this Court within ten days after the publication thereof.

The Appellant obtained in the Queen's Bench Division, before this order was formally drawn up, a rule *nisi* for a prohibition against the carrying out the sentence which resulted in this order.

Prohibition is the common law proceeding by which any of the superior temporal Courts at Westminster (not the Queen's Bench only) are enabled to restrain, amongst others, the Courts Ecclesias-

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tical from acting in excess of their jurisdiction; but it does not enable the temporal Court to act as a Court of Appeal from the Court Ecclesiastical, so as to correct any irregularity or even injustice which may have been done by the Ecclesiastical Court, if done in the exercise of their jurisdiction. The majority of the Queen's Bench Division, Chief Justice *Cockburn* and Mr. Justice *Mellor*, *dissentiente* Mr. Justice *Lush*, thought that in making this order Lord *Penzance* exceeded his jurisdiction, and they made the rule absolute. Formerly, in order to take the opinion of a Court of Appeal, it would have been necessary to have the applicant declare in prohibition, to which declaration the other side could plead, and then the matter being put on the record and disposed of in the Court below, by judgment on the verdict, if the issues taken were issues in fact, or on demurrer if the issues taken were issues in law, error would lie on that judgment. Now, there may be an appeal against the rule. Such an appeal was brought. The majority of the Court of Appeal, Lord *Coleridge*, Lords Justices *James* and *Thesiger*, *dissentientibus* Lord Justices *Brett* and *Cotton*, discharged the rule. From this there is an appeal to this House.

The first question, as I think, is, What is the effect of the order? Does Lord *Penzance* there pass a sentence on Mr. *Mackonochie* for a new ecclesiastical offence committed in 1878 aggravated by his having been previously convicted, so that Lord *Penzance* acts in a new proceeding, instituted since the letters of request? In that case I should agree that he contravened the *Church Discipline Act*. Or does he pass a sentence of suspension *ab officio et beneficio* as a step in the proceeding which was regularly instituted in 1874, as a punishment for disobedience to the monition which he considered contumacy? In the latter case he may or may not have exceeded his jurisdiction, but has not contravened the *Church Discipline Act*.

It was argued that at least it was doubtful whether he was not doing both, and it was argued that, as the first was in excess of jurisdiction, a prohibition should go against all, whether the rest was within his jurisdiction or not. But common sense and the course of precedents are alike against this contention. Where part is within the jurisdiction and part not, a prohibition is awarded against doing what is in excess of jurisdiction, and a consultation

as to the rest. For this it is enough to cite *Townsend* v. *Thorpe* (1), *Middleton* v. *Crofts* (2), and *Free* v. *Burgoyne* (3).

It was argued that your Lordships ought to act in conformity with the principle of the decision of *Reg.* v. *O'Connell* (4), and some countenance is given to that argument by Lord Justice *Cotton* (5), where he says that it is impossible to divide the order or apportion the sentence. I do not think that principle is applicable to prohibition. But I do not think the question arises. For unless the judgment of an Ecclesiastical Court is, in prohibition, to be construed as it were on special demurrer, and almost *ut res magis pereat quam valeat*, for which I know of no authority, I think this order of Lord *Penzance* must be understood as shewing that he thought this suspension a proper sentence, and not too great as a sentence given for punishing the disobedience to the monition of 1875, and so enforcing the monition of the Court issued in the time of his predecessor. And that brings me to what is the only question in this prohibition on which I mean to express an opinion. Was that sentence thus understood within the jurisdiction which, by the laws of this country, is entrusted to the Court of Appeal for the Province of *Canterbury?*

My Lords, I have come, for the reasons I shall state afterwards, to the opinion that the Court of Arches did nothing which was in excess of its jurisdiction, and I do not mean to express any opinion whatever on the question as to the limits between what would be properly matter for prohibition, and what would be matter of appeal only. It is a very difficult question; any one who reads the case of *Gould* v. *Gapper* (6), the doubt expressed by Justice *Patteson* in *Blunt* v. *Harwood* (7) as to whether that case was rightly decided, and his subsequent recantation of that doubt in *Burder* v. *Veley* (8), will see how difficult. I do not express any opinion on it one way or the other, because, in the view I take of the matter, the question does not arise, and, though it is hardly necessary, I desire to say that it is not to be supposed either that I agree to any doctrine on that subject which has been laid down,

(1) 2 Ld. Raym. 1507.
(2) 2 Atk. 650.
(3) 5 B. & C. 400.
(4) 11 Cl. & F. 155.
(5) 4 Q. B. D. 736.
(6) 5 East, 345.
(7) 8 Ad. & E. at p. 619.
(8) 12 Ad. & E. 264.

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because I do not expressly dissent from it, or that I dissent from any such doctrine because I do not expressly agree to it. I mean literally to express no opinion.

The ecclesiastical law of *England* is not a foreign law. It is a part of the general law of *England*—of the common law—in that wider sense which embraces all the ancient and approved customs of *England* which form law, including not only that law administered in the Courts of Queen's Bench, Common Pleas, and Exchequer, to which the term Common Law is sometimes in a narrower sense confined, but also that law administered in Chancery and commonly called Equity, and also that law administered in the Courts Ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm—and form, as is laid down in *Caudre's Case* (1), the King's ecclesiastical law. All these laws may be, and are, altered by statutes. When the question arises what is the English ecclesiastical law, it is not ascertained by calling witnesses to prove it, as if it were a foreign law, but taking judicial notice of what the law is, it is ascertained, by argument founded on legal principles and authorities, what the law is on the particular point. Such was the course pursued by the Court of King's Bench, when Lord *Hardwicke* was Chief Justice, in *Middleton* v. *Crofts* (2). It was expressly approved of in this House, to cite no other authorities, in *The Queen* v. *Millis* (3) and *Bishop of Exeter* v. *Marshall* (4).

In determining this question I think great weight should be given to the principles of the ecclesiastical law, laid down by those ancient writers on the ecclesiastical law of *England* whose treatises have been accepted by the Judges in the Ecclesiastical Courts as of authority. Some weight is to be given to foreign jurists who treat of the law ecclesiastical as practised in foreign countries, but much less weight, for it may well be that they are treating of ecclesiastical constitutions which have never been accepted and received in *England*. Very little weight should, in my opinion, be given to treatises so modern as not to have yet been sanctioned by the Judges of the Ecclesiastical Courts.

(1) 5 Rep. 1.
(2) 2 Atk. 650.
(3) 10 Cl. & F. 534.
(4) Law Rep. 3 H. L. 17.

I think great weight is to be attributed to the practice of the Courts Ecclesiastical, and I think the forms of the writs in use are very strong evidence of what that practice is. I do not think these forms conclusive, for no doubt the forms of pleadings and writs sometimes only indicate what was, at a former time, the received law, but which may have now become antiquated and fallen into disuse, the law having in process of time insensibly changed. But most weight of all is, in my opinion—and here I only repeat what was said by Lord *Stowell* in *Dalrymple* v. *Dalrymple* (1)—to be attributed to judicial decisions. And I think this the proper time to consider what weight ought to be given to the decisions of the Judicial Committee in *Martin* v. *Mackonochie* (2), and *Hebbert* v. *Purchas* (3). I think that there is authority for saying that the temporal Court, proceeding in prohibition to restrain excess of jurisdiction in the Court Ecclesiastical, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters. The temporal Courts had carried on a long struggle, first, before the Reformation, with the Pope, and afterwards during the period subsequent to the Reformation, with the Church and the Crown, and many of their decisions may be attributed to a jealousy which they had thus acquired of the Ecclesiastical Courts. But I do not think that the doctrine now in question is open to observation as founded on that jealousy. I think the very nature of a restraining power involves in it a right to consider the decision of the Court which it is sought to restrain, and (if satisfied on sufficient grounds that the decision was a usurpation) a right and consequently a duty, to declare that it was so. And though, when the appeal from the Ecclesiastical Courts was transferred to such a body as the Judicial Committee, it might have been thought that the restraining jurisdiction of the temporal Courts was no longer needed, the Legislature has not thought fit to take away the prohibition to the Ecclesiastical Courts. I see that in *Smith* v. *Brown* (4), decided in 1871, I said that "in a case of prohibition where we are called upon to restrain the Court of Admiralty, we are not bound by any decisions, either in the Court of Admiralty or in the Court of Privy Council,

(1) 2 Hagg. Cons. 81.
(2) Law Rep. 3 P. C. 409.
(3) Law Rep. 4 P. C. 301.
(4) Law Rep. 6 Q. B. 737.

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when sitting in an appeal from that Court, though their reasons are to be weighed with great respect." This, if sound, is equally applicable to prohibition to restrain an Ecclesiastical Court. I do not wish to decide what is not necessary; but I may say that, now that the ultimate Court of Appeal in the Admiralty is this House, the difficulty of applying what I then said to a decision of the House of Lords on appeal from the Court of Admiralty makes me less confident that what I then said is quite sound. I am, however, still inclined to think it was right; but, supposing it to be so, I still think that the majority in the Queen's Bench, and the minority of the Judges in the Court of Appeal, have given far too little weight to these judgments. They seemed to have overlooked this, that assuming that the arguments were sufficient to convince a Court, in prohibition, that it was not (independently of these decisions) made out affirmatively that the course taken was within the jurisdiction of the Court of Arches, it would require much stronger arguments to justify that Court in holding that it was affirmatively made out that the decisions of such a Court as the Privy Council were wrong.

I shall return to this when I say why I dissent from the reasons given by the majority of the Queen's Bench Division and the minority of the Court of Appeal.

I am not aware of any authorities in addition to those already cited, and shall not again go through them. I think it is sufficiently shewn that the course of the ecclesiastical law was to punish ecclesiastical offences, according to their gravity, by the lighter or graver punishments, and that in the case of a beneficed clerk suspension *ab officio* and suspension *ab officio et beneficio* for a fixed period, and deprivation, were all proper ecclesiastical punishments, and all were lighter ecclesiastical punishments than excommunication, which, if it was effectual here and hereafter, was a very terrible sentence, and at the time when the ecclesiastical law was framed and adopted in *England*, it was believed to be effectual in this life and in the next. And the inference seems to me irresistible that wherever the offence was such that the Ecclesiastical Court could impose this terrible ultimate punishment, it could impose the lighter punishment of deprivation, or the still lighter sentence of suspension.

It was not disputed in the argument that though deprivation or suspension *a beneficio* has the effect of interfering with a freehold interest in the temporalities, yet it may, in a proper case, be inflicted by the Ecclesiastical Court. This is decided in *Free* v. *Burgoyne* (1) where the articles in the Ecclesiastical Court were against a beneficed clerk for incontinence and other matters, from which a clerk was, according to the articles, enjoined to abstain "under pain of deprivation of their ecclesiastical benefices, suspension from the exercise of their clerical functions, or such other ecclesiastical punishment or censures as the exigency of the case, and the law thereupon, may require and authorize," and on prohibition a consultation was awarded

And the established form of the writ of monition shews that at the time when that writ was first framed, commanding the delinquent to abstain in future "under pain of the law and contempt thereof," it was contemplated that some sort of ecclesiastical censure could be passed for contumacious disobedience. It seems to me little short of a *reductio ad absurdum* to say that such a monition was not intended to be enforceable at all, and if it could be enforced by excommunication, it does seem very strange if it could not be enforced by a lesser punishment. But the commissioners who were appointed in 1832 to report on the practice of the Ecclesiastical Courts do not mention the punishment of contumacy by anything else than the writ *de contumace capiendo*, given by the 53 Geo. 3, c. 157. I think that does not prove that there could be no other mode of punishing contumacy, though I agree that it is very strong evidence that no other mode was usually adopted; and the research of the learned persons employed in this cause has enabled them to supply but very few instances, before the two recent cases in the Privy Council, in which any other mode has been adopted, none of them recent, and I think none of them very satisfactory. Before these two recent decisions I might have had scruples whether it was right to use a mode of enforcing obedience to a monition, which, though I think it made out that it was a mode that might originally be adopted, was one which had long been allowed to sleep. I incline to think that I should have come to the conclusion that it might be done; but

(1) 5 B. & C. 400.

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when the Judicial Committee has twice decided the question, and I am asked to say that they are wrong, the scruples which I might have had are quite immaterial. I cannot say that they are wrong.

I will now proceed, as I think respect to them requires, to examine the reasons of the Judges below, and explain why I dissent from them. Mr. Justice *Mellor* bases his judgment, I think, on the ground that he thinks Lord *Penzance* was proceeding in contravention of the *Church Discipline Act*. He says, "I consider that the offence upon which Lord *Penzance* adjudicated and passed the sentence now appealed against was a fresh and distinct offence against the law ecclesiastical. I mean new and distinct from the offence for which he had been sentenced to suspension and payment of the costs by Sir *Robert Phillimore* when Dean of Arches. It appears to me Lord *Penzance* had no authority to adjudicate and condemn the Defendant, Mr. *Mackonochie*, to a sentence of suspension, applicable only to a definite and specific offence, without fresh letters of request from the Bishop of *London*, in whose diocese the offence arose. All the offences charged against the Defendant were committed within the diocese of *London*, and might have been dealt with in the Consistory Court of the Bishop of *London*, and without letters of request from the Bishop of *London*, the Arches Court of *Canterbury* had no jurisdiction to take proceedings in the matter. When, therefore, Mr. *Mackonochie* had been convicted and sentenced by a definitive sentence of the then Dean of Arches, and had suffered the punishment assigned to such offence, the suit was at an end. He might be liable in a summary proceeding by way of contempt, and punished in the course prescribed by the statute of Geo. 3, namely, by *significavit* and imprisonment; but, as it appears to me, in order to proceed for a fresh specific offence which might end in a sentence of suspension and deprivation it was essential that a new suit should be instituted, and that fresh letters of request should be obtained from the Bishop of *London*. There is no analogy in the law in criminous matters, by which, when a new offence has been committed by a Defendant he can be called upon to answer without the institution of a fresh suit, and conducted with the formalities which the law prescribes. It might as well be said that a man who has committed a burglary and been sentenced,

and suffered his punishment for such offence, and who had afterwards committed a fresh burglary in the same house, could be dealt with summarily, and tried and punished without any bill being preferred before a grand jury for such second offence. Possibly the monition given by Sir *Robert Phillimore* on the trial for the former offence might be used in aggravation of punishment on a second trial for a similar offence; but, as it appears to me, it could have no other effect." I have already stated my reasons for not agreeing with this. He also expresses a general concurrence in the judgment of the late Chief Justice *Cockburn*.

My Lords, I have read that judgment of the late Lord Chief Justice more than once, with great attention, and it seems to me that it is all based upon one position, which he assumes, but does not prove, to be law. He says (1), "It is familiar knowledge that the only coercive process or punishment for contumacy possessed by the Ecclesiastical Courts was, prior to the 53 Geo. 3, c. 127, excommunication, which, when 'signified,' as it was termed, to the Court of Chancery, was followed by the writ *de excommunicato capiendo*, confirmed and regulated by the statute of the 5 Eliz. c. 23, under which the party was committed to prison till he made his submission and rendered obedience. For this process, by the Act of 53 Geo. 3, was substituted the writ *de contumace capiendo*, under which a party decreed to be contumacious might be imprisoned till submission and obedience; to which was added, by 2 & 3 Will. 4, c. 93, power to sequester the estates of contumacious persons privileged from arrest, and who were not, therefore, subject to the process in question. . . . The Ecclesiastical Commissioners say: 'The execution of the sentence, in case there be no appeal interposed, is either completed by the Court itself, as by granting probate or administration, or signing a sentence of separation, or remains to be completed by the act of the party, as by exhibiting an inventory and account, by payment of the tithes sued for, and other similar matters, in which case execution is enforced by the compulsory process of contumacy, *significavit* and attachment.'" And afterwards he says (2):—"The established and only penalty of contumacy was not suspension, but, as I have shewn, imprisonment, under 53 Geo. 3."

(1) 3 Q. B. D. 757. (2) 3 Q. B. D. 768.

H. L. (E.) 1881 MACKONOCHIE v. LORD PENZANCE. Lord Blackburn.

Neither Chief Justice *Cockburn* nor any other practitioner at that time alive can have had personal knowledge of the course of proceeding before 53 Geo. 3. And no authority is cited by him, and none has been found or produced by the learned counsel for the Appellant, in support of this position, and I know of none. The only mode in which the Ecclesiastical Court could cause the delinquent to be imprisoned was by excommunicating him, and signifying at common law to the Court of Chancery that he was excommunicated and in contempt of the keys; whereupon a writ *de excommunicato capiendo* issued. And I quite agree that this was one mode of punishing contumacy, as is shewn by the form of the *significavit*, that the delinquent was an excommunicated person and a contemner of the keys, which I take from the recital in the writ of relaxation given in *Fitzherbert, De Natura Brevium*, p. 69. But where is there any authority, except that of the Chief Justice himself, for saying it is the only mode? I think, if we can suppose such a thing, a sentence of the Judicial Committee imposing imprisonment or the pillory, would be such a novelty that the Court in prohibition would be justified in saying that it was wrong, and, disregarding its authority, to grant a prohibition. But thinking, as I have already said, that in the balance of legal argument I incline, though with some doubt, to think that before the two decisions before referred to I should have said that there might be other modes of enforcing it, and now being called on to weigh on the one side the authority of the Judicial Committee, and on the other the authority of the Chief Justice very confidently asserted, but supported by nothing but his authority, I do not hesitate.

Lord Justice *Cotton*, after citing the 23rd section of the *Church Discipline Act*, says, I think quite correctly, "The question in this appeal is, in my opinion, having regard to this section, whether the order of the 1st of June was a proceeding to enforce obedience to the decree of the 7th of December, 1874, or whether it is an adjudication upon acts done by Mr. *Mackonochie* since that decree and sentence upon him for those acts as offences against ecclesiastical law. If it is the latter it comes, in my opinion, within the prohibition of the enactment to which I have referred, and is also contrary to the general scope and intention of the Act. Even if

the order of the 1st of June is partly a proceeding to enforce obedience to the decree of December, 1874, and partly such an adjudication and sentence on Mr. *Mackonochie* as above referred to, in my opinion the Queen's Bench Division was right in directing a prohibition to issue, because it is impossible to divide the order, or apportion the sentence." I have already given reasons for dissenting from this last position. He proceeds: "It was argued that to allow a prohibition in the present case would make the decree of the Ecclesiastical Court nugatory, as it would deprive this Court of the power of enforcing its decrees, at least where the act of disobedience is an offence against ecclesiastical law. In my opinion this is not well founded. I do not accede to the argument that a monition which forms part of a decree cannot be enforced. In my opinion, it may in the mode authorized by the Act of 53 Geo. 3, c. 127, and an act of disobedience to an order of the Court may be dealt with as such, even though it may also be an offence against ecclesiastical law."

He does not expressly say that he thinks that it is established law that this was the only way. But I think it is implied; perhaps he took that for granted on the confident assertion of the Chief Justice. At all events he gives no farther reason for it than this: "It is remarkable that the report of the Church Courts Commissioners made in 1832, where, at pages 16 and 19, it deals with the mode of enforcing decrees of the Church Courts, makes no mention of suspension, though that part of the report must, in my opinion, be taken to refer to all suits in the Ecclesiastical Court, whether of a purely civil or of a criminal or corrective character, against the clerks beneficed and unbeneficed, as well as against laymen. This absence of all mention of suspension as a mode of enforcing decrees is certainly, having regard to the learning and high authority of the Commissioners who signed the report, very strongly in favour of the view that suspension is not an authorized means of enforcing decrees of the Ecclesiastical Court. Unless clear authority can be produced to shew that the Ecclesiastical Courts have enforced their decrees by suspension, the report of the commissioners is, to my mind, conclusive. I have already said that I think it strong evidence that it was not a common mode of enforcing their decrees, but not more.

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Lord Justice *Cotton* goes on: "But the authorities quoted in support of the contrary proposition are, independently of two decisions of the Privy Council, very few in number, and moreover, with the exception of an order made by an Archdeacon's Court, they are not free from ambiguity." He then says, "But it is said, and correctly, that in *Hebbert* v. *Purchas* (1), and in the previous case of *Martin* v. *Mackonochie* (2), the Privy Council did make orders for suspension with a view to enforce obedience to decrees. Neither of these cases was argued by counsel for the Defendant, who was suspended, and the attention of the members of the Judicial Committee who heard those cases was in neither of them directed to the question which we have to consider in this appeal. Though this Court is not bound by decisions of the Privy Council, yet I should not feel at liberty to decide that what the Privy Council—the ultimate Court of Appeal from the Ecclesiastical Court—had deliberately decided to be in accordance with the law and practice of that Court, was illegal and irregular. But I cannot look upon these cases as deliberate decisions that obedience to orders can be enforced by suspension."

Lord Justice *Brett* says: "The power is to be proved by the practice. On the one side it is said that, by the recognised practice, this power is proved—that the Court may, on the repetition of the offence by a beneficed clergyman, order him to appear and sentence him to suspension *a beneficio*, or to deprivation; on the other side, it is said that no such practice can be shewn to have ever existed, that no such practice has ever been recognised, that no such power is therefore proved. The proposition in dispute is this, that it was the practice of the Ecclesiastical Courts, after a monition in a sentence admonishing the Defendant to abstain from repeating the offence, and a subsequent alleged repetition of the offence, to summon the clerical delinquent to appear, and upon proof of the repetition to sentence him to suspension *a beneficio* or to deprivation. Whether this proposition is correct or not depends entirely on authority. They who assert that there was such a practice have an affirmative proposition to prove; they who deny it have a negative proposition to support. The one should be able to shew the practice, the others need only say that no such prac-

(1) Law Rep. 4 P. C. 301. (2) Law Rep. 3 P. C. 409.

tice can be shewn. If no practice be shewn those who maintain the negative should succeed. It is no valid argument to my mind to say that there is no authority to the contrary of the alleged practice. Unless the practice is established affirmatively, those who maintain the negative should logically succeed. But if, in the sources in which one would naturally seek for proof of the affirmative proposition, one finds all kindred propositions affirmed, but this omitted, it seems to me that the conclusion is immensely strengthened that the negative of the proposition is proved. Now the first source to which one naturally resorts is that of the books of recognised authors on the practice of the Ecclesiastical Courts." I pass by what he says on that. He then goes on: "One would wish to find instances clearly in point, that is to say, where, upon such an application as was made in this case to Lord *Penzance*, after a monition such as is in question in this cause, a notice to appear has followed, and thereupon a sentence of suspension *a beneficio*, or of deprivation. It is useless to go again in detail through all the cases. It is obvious that there is no such case. I mean there is no case in which it is reported that this thing has been done. *Wilson* v. *Fendall* (1) and *Williams* v. *The Bishop of Salisbury* (2) shew only that a monition may be part of a sentence. they do not shew whether any action can be taken afterwards in the same suit on a repetition of the offence. *Blackmore* v. *Brider* (3) is relied on, because, in his judgment or sentence, Sir *J. Nicholl* uses the expression under 'pain of law.' And *Burgess* v. *Burgess* (4), because Lord *Stowell* says, 'If obedience be not given to this order, excommunication and other consequences will necessarily follow.' And Dr. *Lushington* has, in giving judgment, used similar expressions. It would not be candid, I think, to say that these are not at least important indications in favour of the affirmative proposition, but it seems clear to me that they are not the authority one would wish or expect to find. They are certainly consistent with the view of their being minatory cautions as to probable farther proceedings, which would, however, be obliged to bear the form of a newly instituted suit."

Lord Justice *Brett*, if I rightly follow his argument, thinks that

(1) 2 Moo. P. C. (N.S.) 375. (3) 2 Phillim. 359.
(2) Id. Ib. (4) 1 Hagg. Con. 384.

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no power of the Court Ecclesiastical can exist unless it is every day practice to exercise it. He, like Lord Justice *Cotton*, thinks that the silence of the Ecclesiastical Commissioners is decisive. But he goes much farther than Lord Justice *Cotton*, for he says that no ulterior step of any kind can be taken in respect of a monition. And that though contumacy might, before the statute 52 Geo. 3, have been punished by excommunication, and now by pronouncing the party contumacious, that can, he says, only be done by means of a new suit. I will not say that this is a *reductio ad absurdum*, though to my mind it is very like it, but I will say that it is a position requiring a good deal of argument and authority to establish it. And he disposes of the two cases in the Privy Council in a single sentence:—"I must not omit to refer to the cases in the Privy Council. I must agree that we have not in them the matured view of the very learned Judges who sat there I only wish sincerely we had."

My Lords, I shall now conclude by remarking on the manner in which these learned Judges have dealt with the authority of the two cases of *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2). The Chief Justice treats these as of very little authority. He says (3): "The jurisdiction was for the first time assumed, I had almost said usurped, not indeed by the Judges of the ordinary Ecclesiastical Courts, but by Judges who, however great and eminent, may, I hope without offence, be said to be less familiar with the administration of the ecclesiastical law, namely, by the Judicial Committee of the Privy Council." Lord Justice *Cotton* expressly, and Lord Justice *Brett* by implication, say that the deliberate decisions of the Judicial Committee would be very weighty, but that the two decisions in question were not deliberate. I cannot understand how they arrive at that conclusion.

In *Martin* v. *Mackonochie* (1) the Defendant did not appear, but the Judicial Committee, consisting of the Lord Chancellor (Lord *Hatherley*), the Archbishop of *York*, and Lord *Chelmsford*, did not the less consider the case. Judgment was reserved, and the reasons given by their Lordships for holding Mr. *Mackonochie* guilty of an ecclesiastical offence occupy five pages of print·

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301.
(3) 3 Q. B. D. 764.

Then they proceed to say, "Upon the former occasion their Lordships, after expressing their opinion judicially that the monition had been disobeyed, did not think it necessary to do more to mark their disapprobation of Mr. *Mackonochie's* course of proceeding than by directing that he should pay the costs of the application. Upon this repetition of his offence they think that they ought to proceed farther. They therefore declare that Mr. *Mackonochie* has not complied with the monition in respect of the elevation of the paten or wafer, nor as to abstaining from prostration before the consecrated elements, and they order that he be suspended for the space of three calendar months, from the time of notice of the suspension, from the discharge of his clerical duties and offices and the execution thereof." Their Lordships did not think it necessary to give their reasons for thinking that this sentence might be passed; the judgments in the present case shew that very good reasons might have been assigned. But it seems to me a very strong thing to assume that they passed a sentence which admittedly was not one in the ordinary everyday routine of punishment, at haphazard and without deliberately considering whether they had power to impose such a sentence. It seems to me not to be short of imputing to them, without any evidence, an arbitrary dereliction of duty.

In *Hebbert* v. *Purchas* (1) the Judicial Committee, consisting on this occasion of the Lord Chancellor (Lord *Hatherley*), Lord *Chelmsford*, Sir *James Colvile*, and Sir *Montague Smith*, were asked to inflict a sentence of deprivation. They did not consider the sentence a thing requiring no deliberation, for they required the counsel for the prosecution to inquire into the precedents; and, after a month's interval the argument was heard. Then the Lord Chancellor delivered a short verbal judgment refusing to pass a sentence of deprivation, but saying: "Their Lordships are quite satisfied that there exists in this tribunal, as there did exist in the High Court of Delegates, all the powers which have been transferred to the Committee, a power of suspension not only *ab officio* but *a beneficio* also, as a summary punishment for contumacy." How anyone can have persuaded himself that this was not the deliberate decision of the Lords there present, is to me inconceivable. It is

(1) Law Rep. 4 P. C. 301.

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true that they did not think it necessary to assign the reasons for this decision. I regret it; for if they had assigned reasons, even if of much less weight than those stated in the judgments in the Court of Appeal in this case, we should have been saved from this protracted, and, I cannot but think, lamentable litigation.

I have only to add that I think the judgment should be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords I shall endeavour to state very briefly the view which I take of this case.

I need not refer in detail to the various proceedings which have taken place in the criminal suit instituted against the Appellant, before the Arches Court of *Canterbury*, in the year 1874. The Appellant maintains that the suit was brought to an end by the decree of the 7th of December, and the issue of a formal instrument of suspension under the seal of the Court, upon the 12th of December, 1874; that all subsequent procedure in the suit was irregular; and that the Judge of the Arches Court had not jurisdiction to pronounce the decree of the 1st of June, 1878, by which he suspended the Appellant for three years *ab officio et beneficio*.

I have come to the conclusion that the questions raised by the Appellant are, in substance, questions relating to procedure in the Ecclesiastical Courts. It is not disputed that the Court of Arches would have had power in a fresh suit, to entertain the same charges which are dealt with by the decree of the 1st of June, 1878, and on finding these charges proved, to sentence the Appellant to suspension *ab officio et beneficio* for a period of three years. The jurisdiction of the Court extended to the person of the Appellant, to the subject-matter of the offences alleged against him, and to the punishment which was inflicted upon him; but it is said that the jurisdiction which the Court was thus possessed of could not be lawfully exercised except in one form of proceeding—a new criminal suit against the Appellant; instituted in terms of the *Church Discipline Act*. Whether that contention be well founded, and whether, according to the ancient law and practice of the Ecclesiastical Courts, it was also competent to take proceedings against the Appellant in the suit which commenced in 1874, appear to me to be questions of procedure which it is within

the province of the Ecclesiastical Courts to decide, and the temporal Courts ought not, in my opinion, to interfere with their determination, unless it can be shewn to be either repugnant to the principles of natural justice, or contrary to statute. The procedure of which the Appellant complains, which has been held by the Judicial Committee of the Privy Council in the cases of *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2) to be in strict accordance with the law and practice of the Ecclesiastical Courts, does not in my opinion offend either against justice or statute law. It appears to me to be a just and reasonable course of procedure, because it enables the Court to pronounce a milder sentence in the first instance, whilst it reserves the power of inflicting an adequate punishment if the orders of the Court are not complied with. It is manifestly for the advantage of those offenders who, whenever the judgment of the Court is against them, endeavour to act in conformity with the laws of the Church; and it cannot be said to bear with undue severity upon those who wilfully continue practices which have been declared by the Court to be contrary to that law, and from which they have been judicially admonished to desist.

But it was argued for the Appellant that the proceedings in question are contrary to the provisions of 53 Geo. 3, c. 127, and 3 & 4 Vict. c. 86. That argument necessarily proceeds upon the assumption that prior to the statute of Geo. 3 it was competent to punish by suspension acts of disobedience to a decree and monition of the Ecclesiastical Court, by proceedings taken in the same suit in which the decree and monition were made and issued. Neither of the statutes has, in my opinion, the least application to the facts assumed. The Act of 53 Geo. 3, deals only with the graver sentence of excommunication, and makes no change in the previous law or practice of the Ecclesiastical Courts with respect to sentences of suspension; and the *Church Discipline Act* of 1840, which regulates the mode of instituting in these Courts criminal suits against clerks in holy orders, does not affect any proceeding which, before its passing, might have been lawfully taken in a suit duly instituted.

I am accordingly of opinion that the judgment of the Court of

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301.

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Appeal ought to be affirmed. I desire to add that, although the grounds I have indicated appear to me to be sufficient for the disposal of this appeal, I am prepared to hold that the decisions of the Judicial Committee of the Privy Council in *Martin* v. *Mackonochie* (1) and *Hebbert* v. *Purchas* (2) are according to law; and I refer to and accept the reasons which are stated in the exhaustive judgment delivered by the late Lord Justice *Thesiger* in the Court of Appeal.

Orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 7th April, 1881.

Solicitors for Appellant: *Brooks, Jenkins, & Co.*
Solicitor for Respondent: *Solicitor to the Treasury.*

[HOUSE OF LORDS.]

H. L. (E.) 1881 *May* 5, 6.

WILLIAM DAVIS . . . . . APPELLANT;
AND
WILLIAM TREHARNE . . . . . RESPONDENT.

Mines—Injury to the Surface of the Land.

8 App. Ca. 196. 23 Ch D 295. 8 App. Ca. 831 11 QBD 825

A clause in a mining lease that the lessee may work the mines "in the usual and most approved way in which the same is performed in other works of the like kind in the county," refers simply to the mode of carrying on the underground works for mining purposes; but does not suppose a custom to work the mines so as to injure or interfere with the rights of other people.

Nor did the words that the mining lessee should have liberty to enter upon the land and carry away the minerals, and to erect buildings, and "do and execute all such other acts, works, and things upon, in, or under, or above, the said premises, as shall be necessary or convenient for working and carrying away the same," making compensation, &c., enlarge the power so to deal with the mines as to let down the surface.

Per LORD BLACKBURN:—In common right the person who owns the surface has a right to have it properly supported below by minerals. A Court of Law has to look at the documents to see whether the parties have agreed upon something different from the common right.

APPEAL against a decision of the Court of Appeal, which had affirmed a previous judgment of the Common Pleas Division.

By a lease, dated on the 18th of January, 1865, *John Popkin*

(1) Law Rep. 3 P. C. 409. (2) Law Rep. 4 P. C. 301.

Traherne demised to *Davis* certain veins, mines and seams of coal, ironstone, and blackband, being part of the minerals lying under a certain farm and lands called *Llwydarth*, in the county of *Glamorgan*, with power to *Davis* to enter into and upon certain portions of the said farm and lands, and to open, get, and carry away the said veins, mines, &c., for the term of forty years, from the 29th of September, 1865, subject to certain rents and royalties. The lease contained a covenant that *Davis* would "work the said veins, &c., during the continuance of this demise in the usual and most approved way in which the same is performed in other works of the like kind in the county of *Glamorgan*," and at the end of the term would "compensate the said lessor for any damage or injury done to the surface of the said farm and lands."

By a lease dated in January, 1869, *J. P. Traherne* granted a part of the farm and lands, together with "the cottage, or dwelling-house, and outbuildings thereon," to one *Thomas Thomas*, for a term of ninety-nine years, reserving to himself "all minerals, mines, &c., in or under the said lands, with liberty, power and authority to the said *J. P. T.*, his heirs and assigns, or other persons entitled to the reversion of the said premises, to enter and be upon the said premises to search for, win, and work and carry away the minerals, mines, &c., in or under the land, or in or under any other lands which, or the mines and minerals under which, may for the time being belong to the said *J. P. T.*, and to erect all such buildings, machinery, and things," &c., necessary for the purpose, "he and they making reasonable compensation to *Thomas*, his assigns, &c., for all damage occasioned by the exercise of the rights hereby reserved." The interest of *Thomas* became vested by assignment in the Respondent, *William Treharne*.

In July, 1869, *J. P. Traherne* demised to *Davis* other seams and veins of coal, &c., lying under the farm and lands referred to, and it was arranged that *Davis* should surrender his lease of 1865 and take a fresh lease, which should include the whole of the veins of coal, &c., in the property in question. This was done by a lease for sixty years as from the 26th of March, 1869. The covenants in the lease of 1865 being repeated in the new lease. By a lease of April, 1871, *J. P. Traherne* demised to the Respondent *William Treharne*, the other portion of the land, &c., for ninety-nine years, reserving to himself all minerals, &c., in or under the

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land thereby demised, with power to *J. P. Traherne*, his heirs and assigns, or the persons entitled to the reversion, &c., to enter upon the land and search for and carry away the minerals, &c., in or under such land, "and to erect all such buildings, machinery and things, and do and execute all such other acts, works and things, upon, in, or under, or above the said premises, as shall be necessary or convenient for working and carrying away the same; he and they making reasonable compensation to the said *William Treharne*, his executors, &c., for all damage occasioned by the exercise of the rights hereby reserved."

Thomas had erected on his land a dwelling-house, and when *William Treharne* entered into possession of the additional land, the subject of the lease of 1871, he erected two other dwelling-houses thereon. Both the original lease to *Thomas* and the lease of 1871 contained covenants for the erection of houses upon the land.

In March, 1878, *William Treharne*, who complained that his land and his houses had been injured by the works carried on by *Davis*, commenced an action in the Common Pleas Division, claiming damages on that account, and praying for an injunction. The action was tried before Lord Chief Justice *Coleridge*, at the *Swansea* Assizes, in August, 1878, when the jury found that the houses had been injured by the subsidence of the soil; that that subsidence was occasioned by the working in the mines, and that it occurred after the 1st of July, 1869. The question of damages was referred to one of the judicial referees, who reported the amount to be £700. It was admitted at the time that the actual working of the mine had been in the usual and approved manner, in which the same was performed in other works of the same kind in the county of *Glamorgan*. After a hearing, Lord Chief Justice *Coleridge* directed judgment to be entered for the present Respondent, and on the 3rd of May, 1880, this judgment was affirmed by the Court of Appeal. This appeal was then brought.

The Solicitor-General (Sir *Farrer Herschell*) and Mr. *Benjamin*, Q.C. (Mr. *Forbes* was with them), for the Appellant:—

The peculiar form of these leases and the rights reserved under them afforded a complete defence to this action. The right reserved to the landlord and his assigns was not in any way

restricted. In *Aspden* v. *Seddon* (1), under leases with covenants exactly resembling these, the Master of the Rolls refused an injunction to restrain the working of the mines, and his decision was affirmed by the Lords Justices. So in *Eadon* v. *Jeffcock* (2), the Defendants having worked the mine in a proper manner were held free from liability, it being held to be clear there, as on the words of the reservations it was clear in this case, that all the coal was intended to be removed. *Taylor* v. *Shafto* (3), *Dugdale* v. *Robertson* (4), *Shafto* v. *Johnson* (5), *Mordue* v. *Durham* (6), and *Benfieldside Board* v. *Consett Iron Company* (7), were referred to and commented on. The case of *Shafto* v. *Johnson* (5) is particularly strong in favour of the Appellant.

Here the terms of the reservation were stronger than in any of the cases. In the lease of 1871, for instance, the reservation was to the lessor, his heirs and assigns, &c., "to do and execute all such other acts, works and things upon, in or under, or above, the said premises as shall be necessary," for working the mines. This reservation specifying both "under and above" must surely include the surface.

There is not, outside this contract, any right to support: *Eadon* v. *Jeffcock* (8); and the contract itself implies that the support is to be taken away, and provides compensation. If, under the circumstances of this case, any compensation can be claimed, it must be in respect of what was done before and not after the leases of 1869 and 1871.

Mr. *McIntyre*, Q.C., and Mr. *B. Francis Williams*, for the Respondent, were not called on.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, I believe none of your Lordships has any doubt on this case, and under those circumstances it is not necessary to call upon the learned counsel for the Respondent.

(1) Law Rep. 10 Ch. Ap. 394. But see the case at law on the question of damages, 1 Ex. D. 496.
(2) Law Rep. 7 Ex. 379.
(3) 8 B. & S. 228.
(4) 3 K. & J. 695.
(5) 8 B. & S. 252, n.
(6) Law Rep. 8 C. P. 341.
(7) 3 Ex. D. 54.
(8) Law Rep. 7 Ex. *per* Baron *Cleasby*, at p. 388.

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The first question is, whether in the mining lease, which was granted to the Defendant Mr. *Davis*, there was a power, as against the lessor, to let down the surface. My Lords, it appears to me, that there is no portion of the lease which in any way justifies any such conclusion. It is a lease carefully prepared in a form usual in mining leases. It gives the lessee power to work the veins, mines, and seams in the usual way. It gives large surface privileges; it excepts certain mines, veins, and seams; and it provides (this is the clause mainly relied upon) that the lessee shall work the said seams and veins of coal during the continuance of the demise "in the usual and most approved way in which the same is performed in other works of the like kind in the county of *Glamorgan*." It appears from parts of the evidence, and it was not in dispute at the trial, that, subject to the question of the right to let down the surface or to injure the surface by taking away the coals, the actual working of this mine was carried on "in the usual and most approved way" in which such works were performed in other parts of the county of *Glamorgan*. I assume that in the Appellant's favour.

But what does that mean? It refers simply to the mode of carrying on the underground works in the mine; which cannot by possibility, either in the county of *Glamorgan*, or anywhere, be a custom, or manner, or method of working, without regard to the rights of other persons. It is impossible that those words "the usual and most approved way of working in the county of *Glamorgan*" can have been intended to absolve the lessee from a legal obligation, collateral to the working of the mine. For this purpose it cannot make any difference, whether the question arises between a lessor who is owner of the surface, and his lessee, or between the lessee and a surface owner who is not lessor. Those words are equally apt, equally effectual, and have the same meaning, in each of those cases. They relate simply to the manner of working the mine for mining purposes; they have no reference to the rights of other persons, which there could not possibly be any local custom in such a district as a county to disregard, and which must be respected in carrying on those works; they cannot be understood to have been meant by either of these parties to signify, that the working must be carried on as if there were no

such rights of other persons, or of the lessor himself, which the lessee was bound to respect.

That point being determined, the case (as was admitted by the learned Solicitor-General), is really at an end; because the other document, the surface lease under which the Plaintiff claims, cannot confer any right upon the lessee of the mines. The most that it does is to subject the surface lessee to such burdens, as, according to its true construction, the lease of the mines imposes on him. I will therefore say no more upon that subject, than that I cannot read the words "or under," which were relied upon, as in any way requiring an implication, that the parties contemplated such underground works as might injure the surface. It appears to me that the powers given by the clause in which those words occur, to "execute all such other acts, works, and things upon, in, or under, or above the premises, as shall be necessary or convenient for working and carrying away the same," (that is, the mines and minerals previously mentioned,) are introduced for a merely subsidiary purpose; and that we must look to the principal words which precede them, to see what were the reserved powers, and for what purposes they were reserved. The previous words have no tendency whatever to shew that it was meant to give any power to take away minerals so as to injure the surface.

The last point, which Mr. *Benjamin* made, I confess appears to me to have nothing in it. The learned Judge asked three particular questions of the jury which were answered, and which had reference no doubt to the real issue between the parties, and not to matters which were not in controversy. There does not seem to have been any controversy as to the precise time at which anything was done before 1871, or its precise effect upon the question between the parties. No such question arose at all; and the evidence appears to have been such as really to exclude it. I consider that we are dealing simply with the case of a verdict in favour of the Plaintiff, and £700 damages found, not indeed by a jury, but by a referee substituted for a jury; and that there is no ground to infer that any part of those damages was given in respect of any act or matter for which, as between these parties, the Defendant ought not to be responsible to the Plaintiff.

I therefore move your Lordships to affirm the judgment of the Court below, and to dismiss the appeal with costs.

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LORD BLACKBURN :—

My Lords, I am entirely of the same opinion. I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shewn—the burden lying upon those who wish to shew it—that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below, in which case of course the owner of the surface could be in no better position than the person who sold it to him. In common right the person who owns the surface has a right to have it properly supported below by minerals, and, if there are mineral workings under the surface, to have a proper support left for it by pillars.

The question here arises whether upon these deeds that right of support was taken away. I think wherever there is a lease of minerals granted to a man on the terms that he shall raise the minerals and pay a royalty on the minerals he raises, there is an inducement, an object, on the part of the grantor of the lease to wish to have as much mineral as possible brought out, so as to get a greater benefit in the shape of royalty. If he has the power of controlling the surface, if it is still in his possession or under his control so that he may deal with the surface as he likes, it may be a very prudent thing for him to agree with the person who takes the lease of the mines that he shall raise all the coal whatsoever without regard to whether it lets the surface fall down or not, because the lessor may think that the value of the royalty upon the coals will, to him, far exceed any mischief that may occur upon the surface. Whether he would be right in so thinking or not would depend upon what the nature of the surface was, and what was the value of the minerals below. If it was a piece of moorland pasture lying above some very extensive and valuable coal fields, I suppose nobody would venture to say that he would not greatly prefer to draw the mineral rent and let the pasture go. He would say, Letting the pasture go will not do me a great deal of harm and getting the mineral royalty will do me a great deal of good. On the other hand, I suppose nobody would doubt

that if a man had the minerals below building land, upon which a very valuable set of buildings in a town had been erected, it would not be good sense on his part to say, I require the mineral lessee to take away the minerals and let the houses come tumbling down; that would be folly. But that is not what we have to consider—that is what the parties had to consider for themselves, namely, was the nature of the property such that it was a prudent and judicious thing to bargain that the mineral lessee should take all the minerals paying a royalty rent upon them and letting down the surface, if such was the consequence; or was it a prudent thing to say that he should take it upon the terms that he was to get all the minerals he could, respecting the right of support of the surface? Which of those alternatives was the more prudent it was for the parties to consider.

But what I apprehend a Court of law has to do is to look at the documents and see whether the parties have agreed upon something different from the common right. If Mr. *Treharne*, when he let the land, had by express words or by necessary implication said, You may take away all the minerals; or, You must take away all the minerals, letting down the surface, he had a perfect right, at least before he had made the two building leases, to do so. But, whether he has done so or not is a question turning upon the construction of the documents. And when I come to look at the documents, though one is more ready, it being a lease, to believe that the parties meant to say, You shall take all the minerals letting down the surface, than one would have been if it was a sale or a reservation of minerals below to be taken out some future time, I cannot agree with what seems to have been said (I do not know whether that was what was meant) by Mr. Baron *Cleasby* in the case of *Eadon* v. *Jeffcock* (1). I cannot agree that it follows from that that there is not a right of support. I think the right of support exists unless it is taken away. I think the fact that it is a lease may be one of the elements to be taken into consideration in seeing whether it is taken away or not, but that it is not enough of itself to decide that question.

My Lords, looking at these two documents, I cannot find anything that takes away that right of support. It is quite true that where parties have agreed in this way, you shall make compensa-

(1) Law Rep. 7 Ex. 379, at p. 388.

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tion for whatever injury you do in respect of these rights, and amongst other things you shall make compensation for what you do in letting down the surface, the conclusion is very strong from that, that the lessor says, You may let down the surface. I do not say that it is conclusive, but it is a very strong argument, if you find that clause, to say that he did mean that the lessee might let down the surface. But when you find it said, as it is here, that he shall do certain things underground and a great many things upon the surface, and afterwards make compensation (as it is said in the lease) "for all damage occasioned by the exercise of the rights hereby reserved" or (as it is said in the lease) shall at the end of the lease "compensate the lessor for any damage or injury done to the surface of the said farms and lands" (that means any damage done to the surface of the said farms and lands in the exercise of the rights previously given), and when we find that those rights do include a great many things which will necessarily damage the surface, the reasonable conclusion is that the meaning is that there is to be compensation for things done in the exercise of those rights. I cannot see that that affords any argument whatever for saying that the lessor intended that the lessee should be able to do something more, and let down the surface. Yet that is really the whole argument; it stands upon that; that because a clause saying, you shall make compensation for letting down the surface affords a strong argument for saying you may let down the surface, therefore a clause saying you shall make compensation for damage done to the surface affords a strong argument for saying that the lessee might let down the surface. I cannot see that. It does not seem to me to be any argument at all.

As to the last point Mr. *Benjamin* took, when we come to look at it, I think it would be a monstrous iniquity if we were to yield to it. It appears to me that the real controversy at the trial was whether the damage was occasioned by working out the old *Victoria* seam long before Mr. *Davis*, the Defendant, had anything to do with the mines, or whether the damage was occasioned by the taking away of certain pillars in the years 1874 and 1875. The two surface leases were in 1869 and 1871. Lord Chief Justice *Coleridge*, in summing-up to the jury said, and everybody I take it then said, The real question is, was the damage done

before 1869 or after? Now it is said that that leaves it open to be a possible thing that it was done between 1869 and 1871. That is clearly against all the contention that was made at the trial, and it would be a monstrous thing if, for such a trifle as that, which it would hardly be using too strong a phrase to call a slip, we were to set aside the verdict.

My Lords, I am clearly of opinion that the judgment is right and should be affirmed.

LORD WATSON:—

My Lords, I agree with your Lordships in the result at which you have arrived.

When a proprietor of the surface and the subjacent strata grants a lease of the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it very clear upon the face of their contract; in other words they must express their intention so clearly as to enable a Court to say that such intention is plain. I think that rule was laid down by the late Lord Justice *Mellish* in the case of *Hext* v. *Gill* (1), and I quite agree with that ruling. It may be done in express terms; but of course it is not necessary that express language must be used; for it may appear by a plain implication from other clauses of the deed, as in the case of *Taylor* v. *Shafto* (2), where an obligation was laid upon the tenant to perform certain acts which were plainly inconsistent with supporting the surface.

But, my Lords, applying those principles to the present case, I am quite unable to find in the terms of this mineral lease of July, 1869, anything to countenance the view that the parties did intend to take away from the landlord, who was letting his minerals, the right to have the surface supported. The clauses with regard to working, and the clause with regard to compensation, are clearly not intended to have any bearing upon the question which is now raised. The clause as to working implies no obligation to work any particular seam or to work any particular part of a seam;

(1) Law Rep. 7 Ch. Ap. 699. (2) 8 B. & S. 228.

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and there is nowhere in the four corners of this lease any obligation laid upon the tenant to work out the whole of the minerals. I think the conception of the lease shews that it was intended that he should leave workable minerals at the end of his lease, because he contracted to leave the plant and fittings of the mine in good and proper condition; and those numerous stipulations which follow this, which were so largely commented upon by the learned counsel at the Bar, were all for the purpose of keeping the mine in proper order, so that the landlord either by self or tenant might enter upon it at the expiry of this lease.

The clauses as to compensation for surface damage would have that bearing if, as was very ingeniously argued by Mr. *Benjamin*, all those particular things which are mentioned immediately before, had been mentioned as causes of injury to the surface. I cannot so read them. The two things are quite distinct. The one obligation is to leave everything that is necessary for the due working of the mine in proper order at the termination of the lease. The other, which is quite distinct, is an obligation to compensate the landlord for any permanent injury done to the surface of his estate by reason of the operations of the mineral tenant during his working.

Therefore, my Lords, I have no hesitation whatever in holding that the argument addressed to us is ill-founded; and I will only add that it appears to me that every one of those clauses which have been so strongly founded upon, would have been an intelligible and appropriate clause in this lease, even though it had contained an express provision to the effect that the tenant in working should not let down the surface of the ground.

My Lords, I so entirely concur with your Lordships upon the other points of this case, which are perhaps not so material as that which I have dealt with, that I do not think it necessary to add anything to what has fallen from your Lordships.

Judgment under appeal affirmed, and appeal dismissed with costs.

Lords' Journals, 6th May, 1881.

Solicitors for Appellant: *Merediths, Roberts, & Mills.*
Solicitor for Respondent: *J. H. Wrentmore.*

WILLIAM MATTHEW HUTCHINSON GIBBONS . . . . . } A DEFENDANT;

AND

WILLIAM MATTHEW HUTCHINSON GIBBONS (THE YOUNGER AN INFANT, BY HIS GUARDIAN) . . . . . } A DEFENDANT.

J. C.*
1881
March 22, 23;
May 14.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Construction of Will—Proviso—"Shall be born in my lifetime" construed as Words of futurity.

The testator devised an estate to his six grandsons (of whom the Appellant was one) "during their respective lives, in equal shares as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life, or respective lives, as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their seniorities in tail male."

By a proviso at the end of the will the testator directed—"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment to the use of the same person respectively for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively according to their respective seniorities in tail male."

Two out of the six grandsons died without issue. The eldest son of the Appellant was born before the date of the will, and by a disentailing

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* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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deed executed after the testator's death conveyed to the Appellant his share and interest in the said estate in fee.

In a suit for declaration of title and consequent relief:—

Held, that the Appellant was entitled to an estate in fee simple in one fourth part of the hereditaments and premises, the subject of the suit.

The words of the proviso must be construed in their grammatical sense, and be taken to mean a tenant in tail male born after the date of the will, and therefore not to include the eldest son of the Appellant. The words "shall be born in my lifetime," in the absence of any context to explain them, are to be taken as words of futurity.

Consequently the gift of an estate tail to the Appellant's eldest son, who was born before the date of the will, was not revoked.

APPEAL from an order of the Supreme Court (June 22, 1880) affirming a decree of the primary Judge in Equity (Dec. 5, 1879), whereby it was held that the Respondent was tenant in tail of one equal fourth part of the property in question under the will of *William Hutchinson*, the testator in the cause.

On the 19th of March, 1879, *Richard Hutchinson Roberts* (the Plaintiff in the Court below), in the will hereinafter mentioned called *Richard Roberts*, filed his bill of complaint against the Appellant in the said will called *William Hutchinson Gibbons* (one of the Defendants in the Court below), and *Mackenzie Bowman*, *Thomas McCulloch*, *George Hill* the younger, *Andrew Hardy McCulloch* the younger, and *Septimus Alfred Stephen*, praying that it might be declared that the Plaintiff and the said Defendants were respectively entitled to the hereditaments and premises called *Golden Grove Farm*, in the pleadings mentioned, in the parts or shares in the pleadings mentioned, for sale or partition, and for consequent relief.

The proceedings in that suit and the material provisions of the will, as well as the facts of the case, are set out in their Lordships' judgment.

The question in the appeal was whether, according to the true construction of the will and the proviso therein contained, *William Kenny Gibbons*, who is the eldest son of the Appellant, took an estate in tail male in his father's fourth share, or a life estate in remainder after the Appellant's death. In the former case the Appellant was entitled to an estate therein in fee simple under a disentailing deed executed in his favour by *William Kenny Gibbons*. In the latter case the Respondent claimed that an estate

therein in tail male in remainder vested in him. The primary Judge, Mr. Justice *Hayman*, decreed in favour of the Respondent. The Supreme Court (*Hargrave* and *Manning*, JJ., *Windeyer*, J., dissenting) affirmed that decree.

Mr. *Eddis*, Q.C., and Mr. *G. Serrell*, for the Appellant, contended that the judgment of the Court below ought to be reversed so far as it declared that *William Henry Gibbons* took only a life interest in the share of the estate in question, and its consequent directions. Under the devise *William Henry Gibbons* took an estate in tail male. He barred the entail, and conveyed the estate in question discharged therefrom to uses in favour of the Appellant in fee simple. The Court was wrong in holding that the proviso affected or altered the estate in tail male of *W. H. Gibbons*. The proviso, on its true construction, and that of the will, only applied to such persons as were born after the date thereof. The plain grammatical meaning of the words "shall be born in my lifetime" should be followed; and they are words of futurity. The Judges below seem to rely on a technical rule that "born" and "to be born" have the same meaning, and that, therefore, the words of the proviso include all persons born before or after the date of the will. That rule only applies to words of limitation, when the word "issue" is taken without reference to time, denoting the quality of the estate given, without intending to distinguish between future and existing issue. But in this case the intention and the plain ordinary meaning of the words coincide. See *Co. Litt.* 20 b.; *Hewet* v. *Ireland* (1); *Doe* v. *Hallett* (2); *Almack* v. *Horn* (3); *Re Sheppard's Trusts* (4). The paramount intention of the testator is not to be overthrown by technicalities: *Barnes* v. *Jennings* (5); *Storrs* v. *Benbow* (6); *Early* v. *Benbow* (7), referring to and commenting on *Wilkinson* v. *Adams*; *Early* v. *Middleton* (8); *Townsend* v. *Early* (9); *Wilkinson* v. *Adam* (10); *Loring* v. *Thomas* (11). The ordinary

(1) 1 P. Wms. 426.
(2) 1 M. & S. 124, 138.
(3) 1 H. & M. 630.
(4) 1 K. & J. 269.
(5) Law Rep. 2 Eq. 448.
(6) 2 M. & K. 46, 48.
(7) 2 Coll. 342, 348; 15 L. J. (N.S.) (Ch.) 169.
(8) 14 Beav. 453.
(9) 3 D. F. & J. 11.
(10) 1 V. & B. 422.
(11) 1 Dr. & Sm. 514.

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meaning must prevail, for it is not necessary, having regard to the whole scheme of this will, to overrule it. Where there is a clear gift to *A.*, a proviso that in a certain event it is to be cut down must be construed strictly, and such gift will only be cut down by clear and definite words: *Sturgess* v. *Pearson* (1); *Nunn* v. *Hancock* (2). Moreover, the will contains several devises of estates in tail male. [Mr. *Mackeson*, Q.C.:—There are twenty-one in the will and three in the codicil.] The proviso must apply to all or none, and the testator must have meant them in their future signification. The interpretation adopted by the Courts below would include devisees in tail male previously named: see *Lynch* v. *Johnson* (3).

Mr. *Mackeson*, Q.C., and Mr. *W. Owen*, for the Respondent, contended that upon the true construction of the will the Respondent took an estate in tail male in the share of the hereditaments in question; and that his father, *William Henry Gibbons*, took only a life estate therein. The expression "shall be born" is equivalent to "shall have been born," by a technical rule of construction, which must be followed unless there is a clear intention to the contrary. All the children and grandchildren born in the testator's lifetime, whether before or after the date of the will, could take no greater than life estates. The proviso applied to all classes of children, tenants in tail male, born during the testator's lifetime, whether before or after the date of the will. Reference was made to 2 *Jarman* on Wills [3rd ed.], p. 168; *Almack* v. *Horn* (4); *Slingsby* v. —— (5); *Hebblethwaite* v. *Cartwright* (6); *Doe* v. *Hallett* (7). Again, *Hewet* v. *Ireland* (8) is a strong case to shew that where the intention is clear, words with a future signification must accommodate themselves so as to include the past. With regard to the *Benbow* cases cited on the other side, and also *Townsend* v. *Early* (9), not cited on the other side, they were affirmed in *Townsend* v. *Early* (10); but *Early* v. *Benbow* (11) is the only one in which "shall" or

(1) 4 Madd. 411.
(2) 16 W. R. 818.
(3) 4 Vic. L. R. 263.
(4) 1 H. & M. 630, 633.
(5) 10 Mod. Rep. 398.
(6) Cas. t. Tal. 31.
(7) 1 M. & S. 124.
(8) 1 P. Wms. 426.
(9) 28 Beav. 429.
(10) 3 D. F. & J. 11.
(11) 2 Coll. 342, 348; 15 L. J. (Ch.) (N.S.) 169.

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"may" has been construed to mean futurity, contrary to the general intent. Reference was then made to *Loring* v. *Thomas* (1); *In re Chapman's Will* (2); to cases where the testator gives an estate with a proviso in case the donee "shall" become bankrupt: *Seymour* v. *Lucas* (3); *Yarnold* v. *Moorhouse* (4); *Manning* v. *Chambers* (5); *White* v. *Chitty* (6); *Trappes* v. *Meredith* (7); *Wynne* v. *Wynne* (8); *Barnes* v. *Jennings* (9). See also *Davies* v. *Atkinson* (10); *Bythewood's* Conveyancing, vol. xi. [3rd ed.], 830.

Mr. *Eddis*, Q.C., replied.

J. C. 1881 *May* 14.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This is an appeal in a suit brought in the Supreme Court of *New South Wales* by *Richard Hutchinson Roberts* against the Appellant and five other persons, praying that it might be declared that the Plaintiff and the Defendants were respectively entitled to certain hereditaments and premises called *Golden Grove Farm* in the parts or shares in the pleadings mentioned, and that the same might be sold or partitioned, and for consequent relief. On the hearing on the 25th of June, 1879, a decree was made directing a reference to the Master of the Supreme Court to inquire and report who were the parties interested in the said hereditaments and premises, and for what estates and interests, and in what shares and proportions, and whether they were parties to the suit, and that the Respondent, the eldest son of *William Kenny Gibbons*, should be served with notice of the decree.

On the 16th of October, 1879, the Master reported that if under the will of *William Hutchinson* the testator in the pleadings mentioned, *William Kenny Gibbons* took a freehold estate in tail male in the said hereditaments and premises, the Respondent *William Matthew Hutchinson Gibbons*, the younger, was not interested, and

(1) 1 Dr. & Sm. 497.
(2) 32 Beav. 382.
(3) 1 Dr. & Sm. 177.
(4) 1 Russ. & My. 364.
(5) 1 De G. & S. 282.
(6) Law Rep. 1 Eq. 372.
(7) Law Rep. 7 Ch. 248.
(8) 2 Keen, 778.
(9) Law Rep. 2 Eq. 448.
(10) 18 W. R. 1016.

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had no estate therein, and was not a necessary party to the suit, and the Plaintiff and the Defendants were the only necessary and proper parties thereto; but if, under the will, *William Kenny Gibbons* took only a life estate, then the freehold estate in remainder in one fourth of the hereditaments and premises claimed by the Appellant was vested in the Respondent, who would be a necessary party to the suit. On the hearing upon further consideration before the primary Judge in Equity of the Supreme Court on the 5th of December, 1879, a decree was made, declaring that under the will *William Kenny Gibbons* took only a life interest, and that the freehold estate in remainder in one fourth of the hereditaments and premises was vested in the Respondent, and that he was a necessary party to the suit, and the pleadings were directed to be amended by making him a party as Defendant. This was done, and, on the 22nd of June, 1880, the cause came on to be heard on the appeal of *William Matthew Hutchinson Gibbons*, the present Appellant, before three Judges of the Supreme Court, when two of them, one being the primary Judge, delivered judgment in favour of the Respondent, and affirmed the decree and dismissed the appeal. The judgment of the third Judge was in favour of the Appellant.

The present appeal is from that affirmance.

William Hutchinson, by his will, dated the 20th of December, 1845, among other bequests and devises, devised his estate called *Golden Grove Farm*, after certain estates which have since determined, as follows:—

"To the use of my grandsons, *William Hutchinson Gibbons*, *Mackenzie Bowman*, *Thomas Ormonde Clarkson*, *Charles Roberts*, junior, *William Charles Nicholls*, and *Richard Roberts* during their respective lives, in equal shares and proportions as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male; and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail as the share or respective shares which by virtue of this present clause shall have become

vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life or respective lives as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively, according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates, messuages, and tenements, hereditaments, houses, and premises to the use of such only grandson for his life, and after his decease to the use of his and every other son successively according to their respective seniorities in tail male."

The testator also devised many other properties to other persons for life, with remainders to their sons successively in tail male. In many of these devises the words used are "to the use of her (or his) first and every other son successively according to seniority of birth, and the heirs male of the body of such son" (or "in tail male"). In two (to the children of his daughter *Martha Roberts*) the words are "to the use of all the children, if more than one, now born or hereafter to be born of the said *Martha Roberts* by her present husband, in equal shares and proportions as tenants in common in tail, with cross remainders between them in tail." In another part of the will there is a devise of certain property, after the decease of his daughter *Elizabeth Bowman*, to his grandsons, "*Mackenzie Bowman* and *Frederick Bowman*, sons of *William* and *Elizabeth Bowman*, for life as tenants in common, and as to the shares of each of them after his decease, to the use of his first and every other son successively in tail male; and on failure of the issue male of one of them the share to go to the other for life, and after his decease to his first and other sons successively in tail male." And this is immediately followed by a devise of other property after the decease of his daughter *Elizabeth Bowman* "to the use of all the children now born or hereafter to be born of the said *Elizabeth Bowman* by her present husband *William Bowman* (excepting her eldest son, the said *Mackenzie Bowman*, whom I consider I have hereinbefore sufficiently provided for) equally to be divided between them as tenants in common in tail male, with cross remainders between them in tail male." Thus *Frederick*

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Bowman, whom the testator had by name made a devisee for life in the previous devise, was to take by this devise, under the words "the children now born." Then, after a devise of certain property to his daughter *Mary Holden* for life, and after her decease to her husband *John Rose Holden*, if he should survive her, for his life, there is a devise of the property "to the use of *Thomas Ormonde Clarkson* and *George Holden*, both now residing with the said *John Rose Holden* and *Mary Holden*, in *York Street* aforesaid, and all and every other children or child of the said *John Rose Holden* and *Mary Holden* his wife (except an eldest son), to be divided in equal shares and propertions as tenants in common in tail male, with cross remainders between them in tail."

And at the end of the will there is this proviso :—

"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment, to the use of the same person respectively, for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively, according to their respective seniorities, in tail male."

The testator died on or about the 26th of July, 1846, and the will was duly proved in the Supreme Court of *New South Wales*. *Thomas Ormonde Clarkson* and *William Charles Nicholls* both died without issue. *Mackenzie Bowman* has never married, and has been duly found to be a lunatic, and *Thomas M'Culloch*, the committee of his estate, is one of the Defendants.

William Kenny Gibbons is the eldest son of the Appellant, the grandson of the testator, whom, in his will, he calls *William Hutchinson Gibbons*, and was born on the 24th of October, 1844, before the date of the will; and, by a disentailing deed dated the 31st of July, 1866, conveyed to the Appellant his share and interest in the *Golden Grove Farm* in fee.

The Respondent is the eldest son of *William Kenny Gibbons*, and claims that under the proviso he is entitled to an estate in tail male in remainder in one fourth part, and in one third part of another fourth part, of *Golden Grove Farm*, and that *William Kenny Gibbons* is entitled to only a life estate therein.

Of the two learned Judges who delivered judgment in favour of the Respondent, one held that the proviso applied to all tenants in tail born during the testator's lifetime, whether before or after the date of his will. The other held that "the expression in the proviso, 'if any person whom I have made tenant in tale male of my said estate shall be born in my lifetime,' might be appropriately applied to classes of unnamed devisees, of whom it would necessarily be uncertain whether those who would be alive at the testator's death might prove to have been born earlier or later, but not so to individuals whom the testator knew to be already in life, and whom he had specially singled out for remainders in tail." Both appear to have thought that the will must be construed as speaking at the testator's death, in which they were clearly mistaken.

The decision in this appeal depends upon the construction of this proviso. The learned counsel for the Respondent contended that the words "shall be born in my lifetime" had a technical meaning, and must be construed so as to include all persons born before or after the date of the will, and they further contended that the general intention of the will was to extend the rule of perpetuities to its utmost extent; and that all persons born in the testator's lifetime were to have life estates only. But their Lordships do not accede to this view. Where indeed the word "issue" is a word of limitation it may be said that expressions coupled with it and pointing to future births receive a technical construction. In that case there is no gift to the issue; the mention of issue only operates to designate the quality of the interest given to their parent, and the distinction between future and existing issue altogether disappears. It is quite different when there is a direct gift to the issue. In that case the only rule of construction applicable is the common one, that words are to have their natural signification, and that legal and technical words are to have their legal and technical signification, unless there be something in the context of a particular instrument to shew the contrary.

As Vice-Chancellor *Kindersley* says in *Loring* v. *Thomas* (1) where the words were "shall die," "The question is really one of

(1) 1 Dr. & Sm. 523.

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intention, whether the testator intended to make the gift by way of substitution of the issue only of those who were living at the date of the will, or to include the issue of any pre-deceased child; and, of course, this intention can be taken from the language of the will." In cases of substitution an intention is implied on the face of the will that "if the precedent limitation by what means soever is out of the case the subsequent limitation takes place:" *In re Sheppard's Trust* (1). But in this case the object of the proviso is to cut down certain definite gifts, and this is not to be done unless the intention is clearly expressed: *Sturgess* v. *Pearson* (2). In the case of a proviso to take effect on the legatee becoming bankrupt, words of futurity are not allowed to operate to defeat the manifest intention of the testator, that the gift shall be a personal benefit to the legatee: *Trappes* v. *Meredith* (3).

Numerous cases, to which it is unnecessary to refer, have undoubtedly decided that the words "shall be born," in the absence of any context to explain them, are to be taken as words of futurity. But they have not a technical meaning, except in the case before mentioned, and their construction in other than the ordinary meaning depends upon the intention. It cannot be presumed in this case that the testator's intention was that all persons born in his lifetime were to have life estates, since he has given an estate tail to two persons by their names in the will, and to another who, though not named in that devise, had been named in a previous one. Indeed, it was allowed in the argument that the testator did not intend to include named persons, or any one of whose existence he knew. Thus, if the Respondent's construcsion be adopted, an exception would have to be introduced into the proviso after the words "any person." Again, the proviso is confined to tenants in tail male, and thus could not affect the devise to the children of *Martha Roberts*, which is contrary to the supposed intention. It results therefore from a consideration of the several devises that no such general intention as has been contended for can be collected from the will, and the words of the proviso must therefore be construed according to their grammatical sense, and be taken to mean a tenant in tail male born

(1) 1 K. & J. 276. (2) 4 Madd. 411.
(3) Law Rep. 7 Ch. 248.

after the date of the will. Arguments founded upon the supposed general intention of a testator require to be carefully watched. This was pointed out by the Lord Chancellor in *Giles* v. *Melsom* (1). He says:—"I am led to follow the argument as to the general scheme of the will. It is, I venture to say, a perilous and hazardous argument in most cases where it is used. I do not say that there are not cases in which it may be properly used, but certainly it is an argument which seeks to escape from the necessity of grappling with the meaning of particular words upon grammatical principles, and endeavours to get into a region of speculation as to the probable intent of the testator."

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the Supreme Court, dated the 5th of December, 1879, so far as it declares that under the said will of *William Hntchinson* the said *William Kenny Gibbons* took only a life estate in the hereditaments and premises the subject-matter of the suit and that the freehold estate in remainder in one-fourth part of the said hereditaments and premises claimed by the Defendant, *William Matthew Hutchinson Gibbons*, was vested in the said infant *William Matthew Hutchinson Gibbons* the younger, and that he was a necessary party to the suit, and the order of the said Court on appeal dated the 22nd of June, 1880, affirming the same and dismissing the petition of appeal therein mentioned; and to declare that the said *William Kenny Gibbons* took an estate in tail male in the said one fourth part of the said hereditaments and premises, and that the said *William Matthew Hutchinson Gibbons* is now entitled to the same in fee simple. The costs of the Appellant and Respondent of this appeal, being taxed as between solicitor and client, will be paid out of the *corpus* of the share to which the Appellant, the said *William Matthew Hutchinson Gibbons*, is declared to be entitled.

Solicitor for Appellant: *P. J. Gordon.*
Solicitor for Respondent: *F. W. Denby.*

(1) Law Rep. 6 H. L. 31.

[PRIVY COUNCIL.]

J. C.* 1880 Nov. 20.

JOSEPH PITTS . . . . . APPELLANT;

AND

EDWARD LA FONTAINE, TRUSTEE IN LIQUIDATION OF THE AFFAIRS OF T. B. MORTON & CO. . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME CONSULAR COURT, CONSTANTINOPLE.

Practice—Effect of Order of the Queen in Council—Trustee's Liability for Costs.

When a decision of the Judicial Committee has been reported to Her Majesty and has been sanctioned it becomes the decree or order of the final Court of Appeal; and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.

A trustee in bankruptcy can be made personally liable for costs of a suit to which he is a party, subject to the Court of Bankruptcy allowing him to recoup himself out of the bankrupt estate, if his conduct has been *bonâ fide*.

THIS was a petition of *Joseph Pitts* in the above appeal (which is reported in 5 App. Cas. 564) for an order declaring that on the true construction of an order of Her Majesty in Council, dated the 19th of May, 1880, and made in the said appeal, the Respondent's liability to pay the costs thereby ordered was not limited to the amount of the assets of *T. B. Morton & Co.*, and directing him to pay the balance of the same out of his own moneys. The costs thereby ordered amounted to £411. 2*s.* 4*d.*, the taxed costs of the appeal, and £287 further costs as taxed by the Consular Court in pursuance of such order.

Rules nisi were made for execution in respect of these sums, but the Respondent contended that he had acted under the direction of the Consular Court in obtaining the orders which were set aside with costs by the order of the 19th of May, 1880, and that under the 20th section of the *Bankruptcy Act of* 1869 he was

* *Present:*—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

absolved from any personal liability. He further stated in affidavit that he had refused to act as trustee in the liquidation without the sanction of the Court, and that the only assets of the insolvent firm in his hands were £229. 0*s.* 6*d.*

On the 2nd of October, 1880, the Consular Court discharged the rules nisi, and ordered that the sum of £229. 0*s.* 6*d.* only should be paid on account of the costs as above.

Mr. *Hornell*, for the Petitioner, contended that in such order of the 2nd of October, 1880, the Consular Court misunderstood the meaning of, and failed to give effect to the Order of the 19th of May, 1880. The Respondent had been ordered personally to pay the costs; and such order should now be construed to that effect, and a peremptory order issued to the Respondent forthwith to pay the balance. He referred to *Ex parte Angerstein, In re Angerstein* (1).

Mr. *Lumley Smith*, Q.C., and Mr. *Frank Safford*, for the Respondent, referred to *Ex parte Stapleton, In re Nathan* (2).

Mr. *Hornell* replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is an application for a peremptory order on the Consular Court at *Constantinople* to carry into execution the Order in Council of the 19th of May, 1880, so far as it directed Mr. *La Fontaine*, the Respondent, to pay certain costs to Mr. *Pitts*, the Appellant. In the course of the argument on the application to the Consular Court for the payment of these costs, a somewhat irregular discussion as to the nature of the order, and the authority from which it emanated, seems to have taken place. On this point it suffices to say that when a decision of this Board has been reported to Her Majesty, and has been sanctioned and embodied in an Order of Council, it becomes the decree or order of the final Court of Appeal—the House of Lords, which was brought into the

(1) Law Rep. 9 Ch. 479. (2) 10 Ch. D. 586.

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discussion, having no jurisdiction whatever in the subject-matter of it—and that it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.

This, which is a first principle, their Lordships cannot presume that the Judge of the Consular Court intended in any way wilfully to violate; and the first question which arises is whether there is really any ambiguity in the words of the order. These are: "And it is hereby ordered that the Respondent do pay to the Appellant all such costs as were incurred in the Consular Court by him, or his wife, the Defendant, *Ellen Jani Pitts*, of and incidental to all the orders under appeal, and the costs of opposing the rules on which such orders were made except the costs of the rule of the 7th January and the order of the 5th February, 1879, made thereon, and such costs are to be taxed by the Consular Court; and the Respondent is likewise to pay to the Appellant the sum of £411. 2*s*. 4*d*. sterling for the costs of this appeal." Nothing can be clearer upon the face of the order than that it is an order in the usual form against the Respondent personally to pay those costs.

This being so, the next question that arises is whether there is any ground on which the action of the Judge of the Consular Court in qualifying and varying the directions of the Order in Council can be justified. His *ratio decidendi* seems to have been that inasmuch as the proceedings were taken, as it is alleged, with the sanction and at the instance of Sir *Phillip Francis*, the former Judge of the Consular Court, the provisions of the *Bankruptcy Act of* 1869, and in particular the 20th section of that statute, make it so irregular and contrary to law to order the Respondent personally to pay costs, that such an order, however plain its terms, must be presumed to mean that the costs were to be paid out of the estate, and so far only as the estate might extend.

With respect to this suggestion of the effect of directions or authority given by Sir *Phillip Francis*, it appears to their Lordships that any such sanction, if relied upon, ought to have been regularly proved by the production of an order of the Court. Here we have nothing in the way of proof but loose affidavits of con-

versations, or alleged conversations, between Sir *Phillip Francis*, the then Judge of the Court, and the counsel for the Respondent, and a dragoman of the embassy. Again, all that appears upon those affidavits is that Sir *Phillip Francis* was regularly or irregularly consulted by the counsel for the Respondent as to what proceedings it would be proper to take in order to realise the bankrupt's interest in the mill in question, and that Sir *Phillip Francis* had previously consulted Mr. *Constantinidis*, the dragoman of the embassy, upon that point also; and that the result was that Sir *Phillip Francis* directed Mr. *Nasmyth*, the counsel for the Respondent, on his behalf, "to bring an action in this honourable Court against the said *Ellen Jani Pitts*, for the sale of the said property under the supervision of this honourable Court." This only goes to shew a sanction of the institution of proceedings in the Consular Court for the realization of the insolvents' interest in the mill; and up to that point the decision of this Board was, that though there might have been some irregularity in the proceedings in so far as they were taken against *Ellen Jani Pitts* without joining her husband, that technical objection might be waived, and that the sale which took place under the order of the Court of the bankrupts' interest was to be treated as good, and was to be upheld. But it appeared that the sale had been followed by a series of irregular proceedings against Mr. *Pitts*, who was not a party to the suit, the object of which was to turn out him, who was a partner in this mill with the bankrupts, and to exclude him from his share in the mill. This tribunal held that all these latter proceedings were irregular and could not be upheld; and it is quite clear that no sanction is shewn to have been given by Sir *Phillip Francis* to these particular proceedings, which all took place some time after his death. If, then, the sanction of Sir *Phillip Francis* could have availed anything to the Respondent on this occasion, the proof of it wholly fails.

Again, can it be said that, under the *Bankruptcy Act* of 1869 (the 20th section is the section on which the learned Judge principally relied), a trustee under that Act can in no case be made personally liable for costs. It seems to their Lordships that the law, as might reasonably be expected, is the other way. They

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have been referred to two cases. One is *Ex parte Angerstein, in the Matter of Angerstein* (1) and establishes the general rule. The Court had there ordered that the trustee should pay to the Appellant his costs of the application to the registrar which he might recover from the bankrupts' estate. It was suggested that there was scarcely any estate, and that the effect of their Lordships' order would be that the trustee would have to pay a great part of the costs personally. But Sir *George Mellish*, L.J., said, "It is quite right that the order should be in that form. The reason for ordering the trustee to pay costs is that applications of this kind to the Court of Bankruptcy are in substitution for actions at law. In an action at law a trustee in bankruptcy would be liable in the same way as any other Plaintiff. In a case where a trustee makes an application, the success of which is doubtful, he ought, before making it, to get from the creditors an indemnity against the costs if he knows that there are no assets out of which they can be paid. I see no difference between the case of an official liquidator and a trustee in bankruptcy. With regard to the former, we have already laid down the rule that he must pay the costs if he fails in an application." In every case of that kind, of course the question may arise whether the trustee, having had to pay costs to the party aggrieved by an unsuccessful and improper claim, may not, if he has acted *bonâ fide*, have a case for recouping himself out of the bankrupt estate if there are funds. That is a question to be determined in the Court of Bankruptcy in the administration of the bankrupt estate. Any order of their Lordships here against Mr. *La Fontaine* would, of course, leave that question open. It is a question with which their Lordships have nothing to do, and on which they express no opinion; but it is clear that, whatever Mr. *La Fontaine's* right in that respect may be, it affords no reason for depriving Mr. *Pitts* of that which the order gave him, and gave him consistently with general law.

The other case referred to was that of *Ex parte Stapleton, In re Nathan* (2). In that case Mr. *Stapleton* had contracted to sell a cargo to the liquidating debtor. Before the cargo was delivered the liquidating debtor became insolvent. He had given

(1) Law Rep. 9 Ch. 479. (2) 10 Ch. D. 586.

acceptances which were worth nothing for the goods, and *Stapleton* claimed the right of repudiating the contract, making a re-sale, and then coming in under the bankruptcy to prove the loss upon that re-sale. The registrar rejected his proof, and Mr. *Stapleton* then appealed to the Court. All that bears upon this case is, that upon that appeal the appeal was allowed with costs; but Lord Justice *James* says:—"The order will be for the payment of costs out of the estate, not by the trustee personally. The trustee is not the Appellant." This authority does not imply that there is any inflexible rule of Court that a trustee should not be personally ordered to pay costs; although under the circumstances, the estate being possibly fully adequate for the purpose, his costs were directed to come out of the estate. And it is to be observed that the form of the order shews that when it is intended to qualify the ordinary liability of the trustee in bankruptcy to pay costs, such qualification is expressly mentioned in the order.

Lastly, if we travel out of the Order in Council in order to learn from the judgment of this Board with what intention the order for the payment of costs was made, we find this passage: "It appears to their Lordships that *Constantinidis*, instead of litigating these questions fairly, has sought to get them indirectly determined in his favour by the proceedings taken in the Consular Court in the name and at the instance of the Respondents; that the Respondent has, from some motive or another, become his instrument and lent himself to that course of action, and that the Court has improperly sanctioned it by the orders in question."

It is, therefore, perfectly clear that if there was sufficient ambiguity in the terms of the order to raise a question as to what the Board intended, the Board did intend to make Mr. *La Fontaine* personally responsible for the costs.

It is very possible that, as stated in the affidavits, Mr. *La Fontaine* may be a very respectable person, and that he may have acted *bonâ fide* though under very bad advice; but that is his misfortune, and can form no ground for depriving the applicant of those costs to which he is entitled.

Their Lordships will, therefore, humbly recommend Her Majesty to make in the usual way a peremptory order for the payment of

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these costs, and they think that the applicant is also entitled to the costs of the present application.

The terms of the order, dated the 27th of November, 1880, were as follows:—

"That the said *Edward La Fontaine* be, and he is hereby peremptorily ordered by Her Majesty, in pursuance of Her Majesty's Order in Council of the 19th of May, 1880, to pay to the said *Joseph Pitts* the balance of the costs incurred on behalf of the said *Joseph Pitts*, both in Her Majesty's Consular Court at *Constantinople* and on the hearing of the appeal to Her Majesty in Council, which costs have been taxed and allowed at the sum of £287 and £411 2*s.* 4*d.* respectively, and Her Majesty is hereby further pleased to order that the further sum of £97 18*s.* 9*d.* be paid by the said *Edward La Fontaine* to the said *Joseph Pitts* for the costs of this petition, and Her Majesty is further pleased peremptorily to order that the said Order in Council of the 19th of May, 1880, be strictly observed, obeyed, and carried into execution. Whereof the Judges of the Supreme Consular Court at *Constantinople* for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

Solicitors for Appellant: *Willoughby & Cox.*
Solicitor for Respondent: *T. Russel Kent.*

[HOUSE OF LORDS.]

BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES.

DYSART PEERAGE CASE.

H. L. (Sc.)
1881
March 7.

Held, that *William John Manners* had made out, and established, his right to the dignities of Earl of *Dysart* and Lord *Huntingtower* in the peerage of *Scotland*.

Irregular Scotch Marriage—Habit and Repute—Mutual Consent de præsenti before Witnesses.

The law of *Scotland* accepts the continued cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of *Scotland*.

Cohabitation outside *Scotland* will not constitute marriage, although it may be competently founded on, either as corroborative evidence of a ceremony in *Scotland*, or as evidence that a ceremony proved to have taken place in *Scotland* was truly intended by the parties as a present interchange of matrimonial consent.

A. alleged that she was lawfully married to *B.* by interchange of mutual consent *de præsenti* before witnesses in 1844 in *Scotland*, and that having remained in *Scotland* for about a month, *B.* and she cohabited at divers places in *England* as husband and wife, and that a son now living was born of the marriage in 1863.

Between 1844 and 1849, when *B.* deserted *A.*, three daughters were born, one of whom *B.* registered as legitimate. In 1851 *B.* married *C.* at a parish church in *England* and had children. *A.* was informed of this marriage shortly after its celebration, but took no steps to have the validity of the averred irregular Scotch marriage of 1844, or the nullity of the marriage of 1851, judicially declared, until 1880. The alleged witnesses to *A.'s* marriage were admitted now to be dead, but they were alive in 1853, when they might have been judicially examined in an action brought against *B.* for the board and lodging of *A.*:

Held, that the evidence completely disproved the allegation of a marriage between *A.* and *B.*

Evidence—Admissibility of Statements not on Oath of deceased Person—Statements post litem motam—Statutes 15 *&* 16 *Vict. c.* 27; 16 *&* 17 *Vict. c.* 20; *and* 37 *&* 38 *Vict. c.* 64.

B. married *C. in facie ecclesiæ* in 1851, had issue, and died in 1872. In an attempt by *A.* to set up a previous irregular Scotch marriage, a witness

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gave evidence that *B.* told him repeatedly after 1851 that *A.* was his wife and not *C.*:—

Held, that such evidence was not admissible.

Effect of the statute 37 & 38 Vict. c. 64 (1874) *held* not necessary to decide.

Precognitions—Admissibility of.

In an attempt on the part of *A.* to set up an irregular marriage according to the law of *Scotland* between herself and *B.*, statements prepared by *D.*, the Plaintiff, in an action against *B.* as the alleged husband of *A.* for *A.'s* board and lodgings; which statement were signed—and in one case corrected by interlineations—by deceased persons who, if alive, would have been competent witnesses, were sought to be used as evidence:—

Held, that they were not admissible.

LIONEL WILLIAM JOHN, 6th Earl of *Dysart*, died on the 23rd of September, 1878. His only son *William Lionel Felix*, Lord *Huntingtower*, predeceased him on the 21st of December, 1872. Lord *Huntingtower* married on the 26th of September, 1851, at *East Horrington* church in the parish of *St. Cuthbert Wells*, county *Somerset*, his cousin *Katherine Elizabeth Camilla*, daughter of Sir *Joseph Burke*, Bart. Of that marriage there has been born, three daughters and one son. The son, *William John Manners*, on his father's death, assumed the courtesy title of Lord *Huntingtower*, which he bore until the death of his grandfather, after which date he answered to the title of Earl of *Dysart*, and exercised as said earl the right to vote at the nomination and election of peers of *Scotland* to vote in Parliament. But being desirous that the allegations of one *Elizabeth Acford*, calling herself the widow of the late Lord *Huntingtower*, should be set at rest, he presented this petition to Her Majesty, praying Her Majesty to be graciously pleased to admit the Petitioner's succession to, and to declare that he is of right entitled to, the titles, honours, and dignities of Earl of *Dysart* and Lord *Huntingtower* in the peerage of *Scotland*. That petition was referred by Her Majesty in July, 1880, to the House of Lords, and by that House to this Committee.

On the 3rd of August, 1880, a petition was presented to the House by a lady styling herself *Elizabeth* Dowager Lady *Huntingtower*, praying that counsel might be assigned her, and that she might be allowed to appear and be heard on behalf of her infant son, *Albert Edwin*, in opposition to the claims of *William John*

Manners as Earl of *Dysart* and Lord *Huntingtower*. She was ordered to lodge a printed case, and counsel and agents were assigned to her. She accordingly lodged a printed case and led evidence in support of it. She averred in her case that (1.) she, "in the month of July, 1844, and at *Grecian Cottage, Trinity*, near *Edinburgh*, in *Scotland*, and by interchange of mutual matrimonial consent, *per verba de præsenti*, was lawfully married, according to the law of *Scotland*, to the late *William Lionel Felix*, Lord *Huntingtower*; (2.) that afterwards she "and the said Lord *Huntingtower* cohabited together as husband and wife, and were habite and repute husband and wife;" (3.) that her "infant son *Albert Edwin Tollemache*, being the only surviving son of the said marriage, is the person entitled" to the titles, honours, and dignities in question.

Her case, *inter alia*, also stated that she was the daughter of *Henry Acford*, a freeman of the town of *Bideford, Devonshire*. But owing to a serious accident which befel her father, rendering him a cripple for life, she was compelled to earn her own livelihood. In 1843 she was in the service of the Rev. *C. W. Scarth*, at *Bathwick* Rectory, *Bath*, as housekeeper. Near the end of 1843, she had given notice to leave, when she received a letter purporting to come from Lady *Dysart*, who had often called to see the Rev. Mr. *Scarth* at the rectory, asking her to go to a certain house in reference to a situation as lady's maid and companion to Lady *Dysart*. She accordingly went to the house directed, and there saw a gentleman who told her he was to engage her on the part of Lady *Dysart*, that Lady *Dysart* knew her and did not require any recommendation, that she was to go to a house at *Southstoke*, a residence about five miles from *Bath*, and engage servants; and that Lady *Dysart* intended to reside there as soon as the servants were engaged. Lady *Dysart* did not appear, but Lord *Huntingtower* visited the house, and after a time one evening came to her sitting-room and took hold of her hands saying he was madly in love with her, and that he would marry her at the parish church. She told him she was engaged, and succeeded in getting away from him. A few nights afterwards she alleged Lord *Huntingtower* burst open her bedroom door, which was locked, and after a very violent struggle, in which she

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was much injured about her person, he had connection with her by force and against her will. She was very ill, and Lord *Huntingtower* told her that if she would go to *London* he would marry her at a registrar's office, and to this, after some hesitation, she consented.

Lord *Huntingtower* went to *London*, and wrote to her begging her to follow him to be married to him. She went, and slept one night alone at the *London Bridge Hotel* under the name of Miss *Acford*.

Next day she went to some rooms in *Berkeley Street*. The Petitioner was so ill that she was ordered to go back to her father's house in *Devonshire*. She accordingly left *London* for her father's home and remained there three or four weeks; whilst there, Lord *Huntingtower* wrote to her most affectionate letters, imploring her to return and that the marriage should be carried out. She returned to *London* about February, 1844, and from there Lord *Huntingtower*—she still being very ill—took her to *Hayling Island*, and they both stayed at *Crosse's Hotel*. After some days Lord *Huntingtower* took a furnished house, and they went there. She became much worse in health, and Lord *Huntingtower* wanted to obtain a special license, but she was too ill to go through the ceremony. After a time she and Lord *Huntingtower* returned to *London* and remained a fortnight at *Middleton* or *Maryland Square*. She was obliged again to leave *London* and go back to her father's. There she remained till June, 1844, during this time she received letters from Lord *Huntingtower* urging her to return to *London*, and promising that if she did he would take her to *Scotland* and make her his wife. Relying on these promises she again came to *London*, and was taken by a Mr. *Kenrick*, a friend of Lord *Huntingtower*, to his own house, to meet Lord *Huntingtower*. Mrs. *Kenrick*, afterwards Mrs. *Steggall*, received her. Apartments were taken for her in *Trevor Square* and the Scotch marriage was frequently discussed. Lord *Huntingtower* often at this time discussing with Mr. *Kenrick* the subject of Scotch marriage. Lord *Huntingtower* then went to *Scotland* to arrange about his marriage with the Petitioner. After some days Lord *Huntingtower* returned to *London*, and pressed the Petitioner to go along with him to *Scotland*, where

he stated he had ascertained they could be married without ceremony. The Petitioner refused to go with him, but agreed to follow him. Lord *Huntingtower* then went to *Scotland*, and it was distinctly understood before he left that the purpose of his going to *Scotland* was to make arrangements there to receive the Petitioner and to marry her there and to make her his lawful wife in such way as the law of *Scotland* allowed.

The Petitioner after hearing from Lord *Huntingtower* left by steamer from *Blackwall*, Mr. and Mrs. *Kenrick* seeing her off, whence she arrived at *Granton*, near *Edinburgh*. Lord *Huntingtower's* man servant, *Frederick Spicer*, met her with a carriage and drove direct to a house called the *Grecian Cottage*, *Trinity*, near *Edinburgh*. Lord *Huntingtower* received the Petitioner on the lawn, they then went inside the cottage, Lord *Huntingtower* called in *Spicer*, and told him he wanted him as a witness. Lord *Huntingtower* then, in *Spicer's* presence, laid his hand on the Petitioner's shoulder and declared and acknowledged her to be his lawful wife, and present matrimonial consent was there interchanged and expressed between the Petitioner and Lord *Huntingtower*. The Petitioner thereupon believed that she was then lawfully married according to the law of *Scotland*. Lord *Huntingtower* intended her to believe and also himself believed that the Petitioner then became his lawful wife. Afterwards, on the same day, Lord *Huntingtower* placed on the Petitioner's finger a wedding ring. At the time of the said declaration *Spicer* was the only servant in the house, but a female servant named *Margaret Ritchie*—afterwards Mrs. *Bremner*—came on the following morning. A few days after a letter was received from Lady *Dysart*, to whom Lord *Huntingtower* had written stating that he had taken the Petitioner to *Scotland* and the purpose for which he had taken her there. In that letter Lady *Dysart* called him a fool, and stated that he could never marry again, and must ever afterwards call the Petitioner his wife. Lord *Huntingtower* read a portion of this letter to the two servants *Spicer* and *Ritchie*, and again declared and acknowledged the Petitioner to be his wife, in the Petitioner's presence and with her consent.

The case also stated that Lord *Huntingtower* said to a policeman named *Horne* that the Petitioner knew but little of *Scotland* as

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she was on her marriage tour. They remained at *Grecian Cottage* from three to four weeks. From there they went to *Newcastle-on-Tyne*, and stayed at the hotel where the coach stopped. There they were known as Mr. and Mrs. *Tollemache*. On the following morning they drove to *Tynemouth* and stayed at the *Bath Hotel*.

Lord *Huntingtower* went on in advance to *London*, and the Petitioner followed him. While they were in *London* Lord *Huntingtower* gave a dinner at *Greenwich* in celebration of the marriage. There were six or eight persons present, including Lord *Huntingtower*, the Petitioner, and Mr. *Kenrick*.

"From the time of the marriage at *Grecian Cottage*, down to October, 1848, Lord *Huntingtower* and the Petitioner lived and cohabited together at divers places in *England* as husband and wife, and were recognised and treated as such by all those with whom they came in contact. Lord *Huntingtower* and the Petitioner generally went at those places by the name of *Tollemache* or *Talmash*, and on one occasion by the name of *Langford*."

The Petitioner's first child was born on the 10th of September, 1845, and was registered by the Petitioner as the son of *William Felix Lionel Tollemache* and *Elizabeth Tollemache*, formerly *Ackford*.

Mrs. *Toone*, the mother of Lady *Dysart*, was very kind to the Petitioner until her death in 1848, and on one occasion sent her £50 sewn between the leaves of the Petitioner's housebook.

The second child, a girl, was born at 4, *Manor Street, Clapham*. Lord *Huntingtower* himself registered this child as born in lawful wedlock. He signed himself "*W. L. Talmash*," giving the mother's name as *Elizabeth Talmash*, formerly *Acford*.

After this they lived at various places—*Greenwich*, at *Walton-on-the-Naze*, at Miss *Pottle's*, *Kennington Lane*, *Kennington*, and at *Camberwell*, and subsequently at Mr. *Cadman's* at *Southend*.

At *Greenwich* they were frequently visited by General *Harrison*, a Mr. *Johnson*, a barrister, a Captain *Corty*, and others. At *Southend* a third child, a girl, was born on the 14th of January, 1848. The father's name was given as *William Lionel Felix Talmash*, Lord *Huntingtower*, and the mother's as *Elizabeth Talmash*, formerly *Ackford*. The Petitioner registered this child herself.

At *Southend* there was a quarrel between them, and Lord *Hunt-*

ingtower, she alleged, took away from her by force the letters she had received from him, including the letter received from Lady *Dysart* by Lord *Huntingtower*, these letters she believed he destroyed. He had previously put some of these letters in her hands telling her to keep them, for they contained facts relating to her marriage. From *Southend*, in February, 1848, they went to Miss *Pottle's*, *Kennington Lane*, and from there went to various other places, Lord *Huntingtower* being pressed for money. Eventually, in August, 1848, they returned to Miss *Pottle*. In October of that year Lord *Huntingtower* took possession by force of another parcel of letters which he had written to her as his wife, and which also related to their marriage in *Scotland*. He then deserted her.

Miss *Pottle* brought an action against Lord *Huntingtower* in the *Bromley* Court for the Petitioner's board and lodging, and recovered the amount claimed. The Petitioner believed she was subpœnaed, and gave evidence in the name of *Huntingtower* or *Tollemache*.

After this she and her children suffered great privations, and after a time she wrote to Lady *Dysart*, who replied that she must call herself by the name of *Ackland*, otherwise she would not correspond with her, or help her in any way. As she and her children were absolutely destitute she was obliged to conform to this request. Lady *Dysart* supported her for some time; but on her refusing to go abroad Lady *Dysart* ceased to give her any assistance whatever. She applied to the *Lambeth* guardians for assistance; they, by their solicitor, commenced proceedings against Lord *Huntingtower*, but the solicitor died and nothing further was done. In 1850, Mr. *Jarrett*, the relieving officer of *Lambeth*, took the Petitioner and her children to his own house and provided them with food and lodging for nearly two years. He brought an action in 1853 against Lord *Huntingtower* for their board and lodging. The Court refused to allow her to be a witness. Mr. *Jarrett* could not afford the means to bring forward witnesses from *Scotland* and elsewhere, and the action was unsuccessful.

While the Petitioner lived at Mr. *Jarrett's* she was informed for the first time of Lord *Huntingtower's* marriage with his cousin, Miss *Burke*. After *Jarrett's* action in 1853, the Petitioner called

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at *Ham House*, where she first saw Lord *Huntingtower* after his marriage with Miss *Burke*, and a painful scene ensued.

In 1854 Lord *Huntingtower's* solicitor prepared a deed of covenant in which the Petitioner was described by her maiden name, Miss *Acford*, and as a single woman, and by which an annuity of £60 was paid to her, on the stipulation that all letters of Lord *Huntingtower* should be given up. The Petitioner signed this deed as she was in destitute circumstances, Lord *Huntingtower* at the same time assured her that she was his true wife, and that by her signing it she would not invalidate her marriage. In 1857 this deed was varied by an agreement which Lord *Huntingtower* brought with him to the Petitioner to sign. She signed this also in her maiden name.

After this agreement Lord *Huntingtower* placed the Petitioner's two eldest daughters at *Norwood*. From that time Lord *Huntingtower*, as her husband, visited the Petitioner, and had intercourse with her from time to time. On the 4th of April, 1858, the Petitioner gave birth to a son, of whom Lord *Huntingtower* was the father. This child died the same year. In 1862 Lord *Huntingtower* still continued to visit her, and on the 15th of February, 1863, she gave birth to a son, *Albert Edwin Tollemache*, on whose behalf the peerage is now claimed, of which son Lord *Huntingtower* was the father.

The annuity was not paid with regularity, and in 1865 the Petitioner brought an action against Lord *Huntingtower*, at *Maidstone*, to recover a part of it, and Lord *Huntingtower* pleaded that the Petitioner was his wife, and the verdict passed for the Defendant on that plea. The solicitor for the Petitioner ultimately effected a compromise of the matter, and the amount sued for was paid. At various times from 1862, Lord *Huntingtower* urged the Petitioner to institute proceedings for a divorce from him, on the ground that he was living in open adultery. At this time Lord *Huntingtower* had left the lady he married in 1851, and was living with a woman of the name of *Dibble*.

July 30, Aug. 3, 1880, and Jan. 21, 24, 25, Feb. 7, 21, 22, 1881. Sir *John Holker*, Q.C., Mr. *W. A. Lindsay*, and Mr. *Badenoch Nicolson*, appeared for *William John Manners* (Earl of *Dysart*).

Mr. *Shiress Will* was counsel for the Petitioner, styling herself *Elizabeth* Dowager Lady *Huntingtower*.

Sir *Henry James*, A.G., *The Lord Advocate* (Right Hon. *J. M'Laren*, Q.C.), *The Solicitor-General for Scotland* (Mr. *J. B. Balfour*, Q.C.), and Mr. *Crawford*, appeared for the Crown.

On the 21st, 24th, and 25th of January, 1881, the Petitioner, claiming to be the widow of the late Lord *Huntingtower*, was examined.

Her examination in chief and her admissions and contradictions in cross-examination, will be found fully set out in the opinions of the Law Peers (1).

General *Harrison* said he was introduced to the Petitioner in 1847, as Mrs. *Tollemache*. Lord *Huntingtower*, with whom he was most intimate, told him, one day they were speaking about committing rapes, that "he had the greatest fight with this *Lizzie* of his to take her, and that he should not have succeeded if he had not promised to marry her, and to quiet the matter up he took her into *Scotland* for that purpose."

Mrs. *Steggall*, formerly Mrs. *Kenrick*, said, that the first time she saw the Petitioner Lord *Huntingtower* introduced her as his wife, saying "We have only been married in the country two or three days before I came up to *London*," and she never remembered Lord *Huntingtower* speaking about *Scotland*, but she admitted her memory was very bad; and the Lords refused to allow her to refresh her memory by a letter written since this controversy arose.

It was admitted that *Frederick Spicer* was dead, but he was proved to have been alive and in communication with *Jarrett* about the time his action was brought against Lord *Huntingtower*.

A witness, first cousin to Lord *Huntingtower*, was about to give evidence that Lord *Huntingtower* between 1860 and 1864, had frequently told him that *Acford* was his wife and not *Katherine Burke*.

Sir *John Holker* objected to these statements being admitted, as they were not part of the *res gestæ*. They were statements not admissible, because they were made *post litem motam*, and made

(1) *Post*, p. 510 *et seq.*

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by Lord *Huntingtower* tending to invalidate a marriage subsequently contracted by him *in facie ecclesiæ*, and to bastardize his issue. Hearsay evidence, as a general rule, was admitted by the law of *Scotland*, but precognitions were not: *Graham* v. *Western Bank of Scotland* (1) and *Macdonald* v. *Union Bank* (2), on the ground that they were not spontaneous and therefore could not be relied on. On the same principle he submitted that the statements of interested persons, or persons self discredited as setting up a prior marriage, should be excluded.

The Lord Advocate referred to the Acts 16 & 17 Vict. c. 20, and 37 & 38 Vict. c. 64, as shewing that until 1874 a party to a matrimonial cause could not be examined as a witness in *Scotland*. A person who had contracted a marriage *in facie ecclesiæ* was not by the law of *Scotland* allowed to prove a previous irregular marriage; the only case in which hearsay evidence of a statement by a deceased spouse as to a marriage having taken place had been received was in *Steuart* v. *Robertson* (3).

He contended that the only effect of the Act 37 & 38 Vict. c. 64 (1874), was to enable the Court to receive direct such statements of the spouses as they could previously have received through the medium of other persons, and that it could not have been intended to permit a person to disclaim a lawful marriage by giving evidence of a prior marriage *per verba de præsenti*.

Mr. *Shiress Will* contended that the whole conduct of the parties alleged to have been married, including their letters and statements, were admissible in support of a marriage *per verba de præsenti*. Although in *Longworth* v. *Yelverton* (4) hearsay evidence of a statement of the alleged husband had been tendered after his death and rejected, it had not been rejected upon the grounds upon which the present objection was rested. Assuming the alleged marriage to have taken place, the fact of Lord *Huntingtower* having gone through another ceremony of marriage afterwards could not deprive the person whom he had previously married of the benefit of any statements he afterwards made,

(1) Court of Sess. Cas. 1st Series, vol. iii. p. 617.
(2) Court of Sess. Cas. 3rd Series, vol. ii. p. 963.
(3) Law Rep. 2 H. L., Sc. 494.
(4) Law Rep. 1 H. L., Sc. 218.

tending to prove the previous marriage. The only effect of the Act 37 & 38 Vict. c. 64, was to make the evidence of one of the parties admissible in an action arising in consequence of a divorce.

The Law Peers delivered the following opinions upon this point:—

1881. Feb. 7. LORD SELBORNE, L.C.:—

We consider this evidence to be inadmissible. We have admitted the *res gestæ* between the parties, upon the principle that whatever actually took place between them ought to be considered. If Lord *Huntingtower*, at the time when these alleged declarations were made, would have been a competent witness by the law of *Scotland*, then the rule of the law of *Scotland* might have come in, which admits proof of the statements, not on oath, of a competent witness after his death. But during the whole of his lifetime Lord *Huntingtower* was an incompetent witness. The cases to which Sir *John Holker* has referred with regard to precognitions, shew, that even when a man might have been a competent witness, and when hearsay evidence as to a deceased person might be admitted, still the Courts are on their guard against extending the application of that which is, after all, an exception to general rules, to new cases, where the declarations sought to be proved have been made under circumstances tending to deprive them of the weight of spontaneous and voluntary declarations. I do not say more about it, because it may be that we may have to hear more upon the question of precognitions afterwards (1).

Then, Lord *Huntingtower* not having been a competent witness, the only question which remains is whether, that being so, he could bind the parties to this proceeding, and create evidence against them, by his admissions made at the time when they are said to have been made, that is, after the status and interest, whatever it be, of these parties had come into existence by a solemn and formal marriage contracted with Miss *Burke* by Lord *Huntingtower* in the face of the Church. Now it is beyond controversy that if such admissions had been actually made by Lord *Huntingtower* on record judicially they would not have been

(1) See p. 507.

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received. Admissions made elsewhere under such circumstances, though they might have been evidence against himself upon principles which have been acted upon in a great number of cases, cannot possibly be evidence to disprove the validity of the marriage with Miss *Burke* contracted in the face of the Church, or to destroy the legitimacy of her children. It is not Lord *Huntingtower* that we are dealing with now, but another person. It appears to me that the principle upon which we should reject such admissions by a man who is not a party to the suit, is one of which we have many familiar instances in the law, which must be common to *England* and to *Scotland*. It was only the other day that the Court of Appeal in *England* were dealing with a case of mortgage in which the mortgagor had assigned his interest in the equity of redemption, and it was attempted to prove payments of interest on account antecedently to that assignment, by admissions of the mortgagee, made afterwards. They were held to be inadmissible, because for this purpose his interest had passed to a stranger, who could not be affected by his admissions.

No authority whatever has been cited for the admission of this evidence, and in my judgment it would be of dangerous example if it were allowed.

LORD BLACKBURN :—

I am of the same opinion. I do not wish to decide anything more than the exact point that is now raised before us, namely, whether this statement made by Lord *Huntingtower*, who died before 1874, is admissible in this case. I say nothing whatever about its weight. My conclusion is that it is not admissible ; and if Lord *Huntingtower* had been the most immaculate and thorough gentleman, whose word every one would have believed as a matter of course, my conclusion would have been exactly the same, and I should still have said that the rule of law required that this evidence should not be received. Of course its weight when received is a different question altogether.

The first thing that I think should be considered is, what is the nature of the proceeding in which this is tendered as evidence. This is not a suit in which Lord *Huntingtower* is a party. This is a proceeding which Her Majesty has sent to the House of

Lords, an inquiry as to who is entitled to the peerage; and the House of Lords has referred it to the Committee for Privileges, who are now to decide who is entitled to the peerage. The evidence which has been given establishes that Lord *Huntingtower* if he had lived would have been Earl of *Dysart* (at least I take it for granted that that is established for the purpose of the present point), and that he did openly, in the presence of every one, marry in the face of the Church, in the year 1851, a lady, and was the father of one claimant to the peerage. An opposite claim is set up, the allegation being that that marriage is void because at the time of that marriage Lord *Huntingtower* was incapable of contracting matrimony, as he had a wife then alive; and no doubt if that was proved, it would be a very good answer to the claim. But that is not a question to which Lord *Huntingtower* is a party. The question whether either, and if one, which, of the two claimants is entitled to the peerage, is a question which I think probably in strictness and accuracy may be said to be a question between the Crown and this House, and the two claimants; but it certainly is not a question in which Lord *Huntingtower* should be considered a party to the cause. That disposes at once of a great many of the cases in which the statements of a person, whether alive or dead, who is a party, or whose representatives are parties, to the cause, are admissible in evidence. There, what he said, whether alive or dead, as against his interest, is admissible as against him, as being his admission. Nothing that Lord *Huntingtower* said could be admissible upon that ground, if he was not a party.

Then there is another view in which a great many admissions and statements may be admissible, and it is this. Evidence has been given (its weight has hereafter to be considered) that Lord *Huntingtower* and the lady, Miss *Acford*, went to *Scotland*; and there has been evidence given that what constituted a marriage by the law of *Scotland*, by words of contract *per verba de præsenti*, did take place there and then. Whether that evidence is reliable or not, and whether it is contradicted by other evidence or not, are not questions that we have now to discuss. It is enough to say that the evidence was given. Then I take it, that both upon common sense, and upon all the authorities, where there

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has been such evidence given, and you are to see whether or no it is true, you look at what the parties did; what is technically called the *res gestæ*, viz., their conduct at the time, their conduct before, their conduct afterwards, and all that they may do and say, as tending to shew that they did really enter into this contract, or as tending, on the other side, to shew that they did not enter into this contract. Whether habit and repute might constitute a marriage in *Scotland* I do not pretend to say with accuracy; but that question does not arise here, because the parties left *Scotland* almost immediately afterwards, and returned to *England*. Habit and repute in *England* could not form a marriage, but it might throw great light upon what took place before. In some cases it would be weighty evidence, in others it would not. But upon that ground the statements of Lord *Huntingtower*, though not a party to the cause, yet being one of the alleged marrying parties, would, whether he was alive or dead (his death makes no difference upon this) be admissible whenever they were part of the *res gestæ*, and part of what would tend to shew that his conduct before or after, was such as to affirm, or disaffirm, the alleged contract that was said to constitute a marriage in *Scotland*.

Now, upon that ground, a great many things are admissible. They are not the less admissible because he is dead, but they are not the more admissible on that ground. The course taken here has been, that when there has been any doubt as to whether matters might have been admissible under that head, they were received *de bene esse*. Many of them will no doubt be received, but some there may be a question about; it will be considered hereafter which of them are admissible and which of them are not. But this present case cannot come under that head, for this reason: that Lord *Huntingtower* did, in the year 1851, marry openly, in the face of everybody, a lady in *England*; he made there the most positive assertion that a man could make that he was an unmarried person; and whatever he may have done since that in declarations to other people as to whether he was married before, or whether he was not married before, can never be received as part of the *res gestæ*, tending to prove or disprove, affirm or disaffirm, the previous evidence of a marriage in *Scotland*. They cannot be received on that ground. They must rest entirely upon the ground

that Lord *Huntingtower* said so, and that he is to be believed or that he is not to be believed, as the case may be. All that I have hitherto said applies equally both as to the law of *England* and the law of *Scotland*. When there comes a decided difference between the laws of evidence as administered in *England* and the laws of evidence as administered in *Scotland*, this being a question of a Scotch marriage, I take it that we are a Scotch Court and that we ought to follow the Scotch law of evidence. In *England* hearsay evidence, that is to say the evidence of a man who is not produced in Court and who therefore cannot be cross-examined, as a general rule is not admissible at all. To that there are several exceptions, one of which is that in cases of pedigree where you prove that a deceased member of a family had made a statement that the state of the family was so and so, for convenience' sake and from the impossibility of proving relationship otherwise, such a statement is admissible as an exception from the general rule excluding hearsay evidence. But upon that exception is grafted another,—that the statement made must have been made before the controversy arose; not that this proved that the statement was false, but that it took away the strong *primâ facie* presumption that the deceased party would speak, to the best of his belief, what was true about the family. The rule, if we had been dealing with the law of *England* here, would not have admitted what was stated after the year 1851 by Lord *Huntingtower*; for, though he was a relative, and the relative of all others who perhaps knew most about it, it was clear that his statement was *post litem motam*, after the time he had married another wife; and if this statement was true, he had two wives. That would clearly not have been admissible in *England*, but the law of *Scotland* has never adopted that principle of the law of *England*. The law of *Scotland* is this, as I understand it, and I quote here from what Lord *Benholme* said in one of these cases (1): "You must produce the best evidence that can be got, and when a witness is alive you must call the witness." I am putting aside admissions which are evidence *per se*, because made by a party to the action. If you shew that a witness is dead, then as a general rule in *Scotland*, I take it, you may prove what he said as bearing upon and proving distinctly a fact.

(1) *Macdonald* v. *Union Bank*, Court of Sess. Cas. 3rd series, vol. ii. at p. 970.

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There must always be a good deal of caution and consideration about whether the evidence of a deceased man was proving a fact, or whether it was some general rambling, vague statement. It is only facts that lay within his own knowledge that could be proved in that way; but the dead man's statement of what he could have proved if called as a witness, would as a general rule be, *valeat quantum*, admissible. I take that to be the general rule. I will not inquire into the cases which have been cited to prove the exception, by which a precognition, as it is called, is held not to be admissible, because that question is not yet raised, and I think it is not desirable to decide or express an opinion upon a question of that sort, until it is actually raised and necessary to be decided. But there is this question now distinctly raised: Can what Lord *Huntingtower* said after the year 1851, when, as it seems to me, he not being a party his admission would not be evidence, and the time when he said it not being such as to make it part of the *res gestæ* which would throw light upon the truth or untruth, the accuracy or inaccuracy, the probability or improbability, of the statement which has been sworn to—that a marriage took place in *Scotland*—can what he said at that time be admissible? I think it cannot, upon this ground: If I am right in saying that by the law of *Scotland* it is received, because the witness being dead you could no longer call him, it would follow at once that you must shew that the man could have been called as a witness if alive. It is impossible to say that if a person said something, and could not himself, if alive, have been permitted to give testimony to prove it, he can, by dying, render that statement admissible. I think that is a self-evident proposition. Now at the time when Lord *Huntingtower* died, and of course, *à fortiori*, during the time when he lived, he could not be received by the law of *Scotland* as a witness in such a case as this. There had been a relaxation of the law of evidence by the Acts of 15 & 16 Vict. c. 27, and 16 & 17 Vict c. 20, by which the evidence of parties, and their agents, and persons interested, was admitted, but these statutes excepted the class of cases of which this is one, cases which related to the *status* of marriage, declarators of marriage, bastardizing of issue, and all that class of cases within which the present case falls. Now Lord *Huntingtower* never during his life, in such an action

as that, could have been called as a witness. He died before the Act of 1874 was passed, and therefore we need not inquire what would have been the effect of it if he had survived. He died when he was incompetent to give evidence as a witness, and it seems to me to follow that if he could not have given evidence when alive, it cannot possibly be competent to give secondary evidence of what he would have said if his death had not prevented him. Taking that view of the case, and without deciding anything else, I think that the present evidence should be rejected.

LORD WATSON:—

My Lords, the question objected to was put for the avowed purpose of eliciting from the witness certain statements that were made to him in the years between 1860 and 1864, by the deceased Lord *Huntingtower*; and I am of opinion, with your Lordships, that that line of examination is not competent, and that the question should be disallowed.

My Lords, I do not think that the present question raises any controversy with regard to the law of hearsay evidence in *Scotland*. What I understand hearsay evidence to be is this: either the writing, or the verbal statement proved by a witness who heard it, of a person deceased, who, if alive would have been a competent witness in this proceeding. But seeing that Lord *Huntingtower* died before the year 1874, there is no pretence for saying that he ever was at any period a witness, who, according to the law of *Scotland*, would have been competent to be examined either for or against his own marriage with the Petitioner in the year 1844.

My Lords, the statements of one in his position would in the ordinary case have been provable according to the law of *Scotland*, notwithstanding that fact of his not being a competent witness, and those statements would have been as provable by third persons during his lifetime as after his death. But the only ground upon which these statements would have been admissible in evidence, as I understand the law, was this; that he was a party to the suit. Now what was meant by his being a party to the suit, was, that he was what we call in *Scotland* a party to the record, appearing either by himself, or what was the same thing, by his personal representatives, after his decease. Statements made by

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him were binding, and were received as statements against him, and those statements were received up to the period of the proof, according to the law of *Scotland*. The principle upon which such evidence was admitted was this. It was in his power when called as a Defender in an action for constitution of marriage, to admit the marriage upon record, and the Court thereupon gave decree at once. It was in his power at any time after he had stated a plea that he was not married, to withdraw from that plea and substitute a confession of marriage; and in ordinary circumstances where there was no impediment, he might do that down to the latest moment before judgment was given, because although in cases of divorce, the Courts of *Scotland*, from fear of collusion, do not permit a Defender to confess, that never was the rule in an action brought for the purpose of constituting a marriage.

But, my Lords, in this case Lord *Huntingtower* is not a party, and he could not have been a witness. Therefore his statement can neither be taken as secondary evidence of what as a witness he could have said, because as a witness he could have said nothing; nor can it be received as a statement of a party to the record, because he is not in that position; and even if he were, I should have been prepared to hold that his marriage *in facie ecclesiæ* in the year 1851, which, according to the law of *Scotland*, conferred upon the issue of that marriage the *status* of legitimacy, at and from the period of their birth, was quite sufficient to make him liable to a personal exception from that date, whenever he came forward to make a statement either in his own suit or in that of others to the effect that he had been previously married.

Upon these grounds, either of which is to my mind quite sufficient, not only to justify, but to require, the rejection of such evidence, I agree with your Lordships.

Counsel were informed that this evidence could not be admitted.

Evidence was given which shewed that the policeman *Peter Horne* died about 1860. Mr. *Shiress Will* tendered in evidence a document, dated the 8th of November, 1851, the body of which had been proved to be in the handwriting of the man *Jarrett* who brought the action against Lord *Huntingtower* in 1853, and the interlineations and signature of which were in the handwriting of *Peter Horne*. He stated that it contained a statement of

matters which took place in 1844, of which *Horne*, if alive, would have been a competent witness.

Sir *John Holker* said he admitted that *Peter Horne* was dead, and that he did not dispute that the signature and interlineations were in his handwriting, but he objected to the reception of the document, being an ordinary precognition, and therefore not admissible.

Mr. *Shiress Will* submitted that it was not open to the objection which had caused the rejection of precognitions in the Scotch Courts, because the interlineations shewed that *Horne* had exercised his mind with regard to the verbal accuracy of the statement. He pointed out that *Horne* had altered the words "I went with Mr. *T.* from *Edinburgh* to *Trinity*" into "Mr. *T.* came to *Granton* County Police Station House;" that he had struck out "as his wife;" that he had inserted "*tour* or *jant*," and also "it is impossible to recollect all;" shewing that he did not accept the statement as originally drawn up. This circumstance took it out of the category of precognitions.

As regards the admissibility of this document as evidence, the following opinions were delivered:—

1881. Feb. 21. LORD WATSON:—

My Lords, I am very clearly of opinion that, according to the law of *Scotland*, this document thus tendered is not receivable. The circumstances under which it was signed by the late Mr. *Horne* appear to be these: Mr. *Jarrett* was intending to raise and prosecute an action against the late Lord *Huntingtower*, and in that action he proposed, if he could make his contention good, to shew that the present Petitioner had been lawfully married in *Scotland* to Lord *Huntingtower*. I do not doubt that the document, so far as we are able to trace its history, is simply a precognition, in other words, written information obtained from a person proposed to be made a witness in that cause. Now I take it to be quite settled in the law of *Scotland*, settled in practice, and confirmed by the case of *Macdonald* v. *Union Bank* (1) in the year 1864, that a document so originating is not competent

(1) Court of Sess. Cas. 3rd Series, vol. ii. p. 993.

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evidence in any subsequent cause. The general rule of the law of *Scotland* is that hearsay of a deceased person who would have been a competent witness, is receivable, and the writing of a deceased witness is hearsay, and in some cases may be hearsay of the very best order. But that rule of the law of *Scotland* is subject to exceptions, and I entirely concur in the view expressed by the present Lord President of the Court of Session in the case of *Macdonald* v. *Union Bank* (1) that those exceptions ought to be favourably received, and that the rule ought not to be widened beyond its present scope. The document tendered appears to me clearly to fall within the exceptions, and therefore must, in my opinion, be rejected by the Committee.

LORD SELBORNE, L.C. :—I am of the same opinion.

LORD BLACKBURN :—I am of the same opinion.

As to a document purporting to be signed by *Margaret Ritchie*, otherwise *Bremner*, dated the 15th of November, 1851, the body of which had been proved to be in the handwriting of *Jarrett*, Mr. *Shiress Will* admitted that the questions in the document appeared to be of a leading character. But he submitted that it might be distinguished from that which the Committee had just rejected by the fact that the answers were entirely in the handwriting of *Margaret Ritchie* or *Bremner*, shewing that she had an opportunity of giving a complete answer to the questions put to her; and also there was appended a declaration that the answers were all true. The answers here were holograph of *Margaret Bremner*, and therefore admissible as the best procurable evidence of what was within her knowledge. *Dickson* on Evidence (2nd Ed.), p. 90, mentioning the case of *Macalister* v. *Macalister* (2), says, "It would seem the letter or note holograph of a deceased person may be used."

[LORD WATSON :—Mr. *Dickson* is not referring there to a holograph letter even sent to an agent; and with reference to the case of *Macalister*, the document in question there appears to have been some answers given by a lawyer in regard to the law of *Penang;* but there was no judgment given upon the point.]

(1) Court of Sess. Cas. 3rd Series, vol. ii. p. 963.
(2) Court of Sess. Cas. 1st Series, vol. xii. p. 198.

See also *Magistrates of Aberdeen* v. *Moore* (1)—voluntary affidavit of a person since deceased refused to be admitted.

The following opinions were delivered :—

LORD WATSON :—

My Lords, I do not think it possible to distinguish between the document which is now tendered and that upon which the Committee have recently ruled. A precognition, I take it, represents the substance of questions or suggestions made by a party or his agent to a particular witness, and the replies given to those questions or suggestions by the witness, and it is simply because it does represent a result so procured that the law rejects it. Now this document seems to me to put in the form of question and answer that which is really covered by the ordinary form of precognition. You have the result stated in the one case ; you have the process by which the result is obtained set forth in the other ; and as it is because the process itself is objectionable that the law rejects the result, I think that when the result appears in the form of question and answer, that objection is not removed, but exists in even a stronger form.

LORD SELBORNE, L.C. :—I quite agree.

LORD BLACKBURN :—I am of the same opinion.

Feb. 21, 22. Sir *John Holker* having no witnesses to call,

Mr. *Shiress Will* was heard to sum up the case of *Elizabeth*, styling herself Dowager Lady *Huntingtower*.

[He cited *Pennycook* v. *Grinton*—promise of marriage followed by conjugal intercourse makes a lawful marriage *de præsenti* (2) ; *Sim* v. *Miles* (3) ; and *Mackenzie* v. *Mackenzie*—marriage having been constituted by habit and repute, no regard will be paid to subsequent writings acknowledging that the parties did not live together as man and wife (4) ; *Dalrymple* v. *Dalrymple* (5).] See also *Erskine's* Prin., 14th ed., pp. 58, 59, and cases there cited.

(1) 17 June, 1813. Hume's Dec. p. 502.
(2) Mor. Dic. 12677.
(3) Court of Sess. Cas. 1st Series, vol. viii. p. 89.
(4) Mar. 8, 1810, Fac. Coll., vol. xv. p. 613.
(5) 2 Hagg. C. R. at p. 95.

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Sir *John Holker* was heard to sum up on behalf of *William John Manners* Earl of *Dysart.*

The Lord Advocate, on the part of the Crown, submitted that *Elizabeth,* styling herself Dowager Lady *Huntingtower,* had not established her case.

The following opinions were delivered:—

LORD BLACKBURN:—

My Lords, the evidence given before your Lordships establishes that the late Lord *Huntingtower,* the eldest son and heir apparent of the last Earl of *Dysart,* on the 26th of September, 1851, openly married, in the parish church, Miss *Burke.* They lived together openly as husband and wife till 1860, a date which it may be material to remember. The Petitioner, *William John Manners,* is proved to be the eldest son of Lord *Huntingtower* by that marriage, and is clearly now the Earl of *Dysart* if that marriage was valid. It was formal and regular in every respect, and is valid, unless Lord *Huntingtower* was incapable of marrying on the ground that he already had a wife then living. The burthen of proof is on those who in any proceeding assert a marriage: when the proceeding is delayed till after there has been a second marriage that *onus* is greatly increased. The man who having a living wife, goes through the form of marriage with another woman in *England,* whether the first marriage was regular or irregular, if it was valid, commits the crime of bigamy, and is liable on conviction to seven years' penal servitude. Those who allege that a man has committed a crime have the *onus* of proof cast upon them, for the presumption of law is always in favour of innocence. I think, however, that Lord *Huntingtower's* general conduct was such as to reduce that presumption in his case to a minimum. But the effect of establishing a prior marriage would also be to reduce the lady, who had *bonâ fide* contracted the second marriage, from the position of a legal wife to that of an injured woman, who has innocently committed adultery, and to reduce the children, if any, of the second marriage from the *status* of legitimate children to that of bastards. Painful as those results would be, they form no reason why the tribunal that has to decide the question should shrink from doing their duty and finding the fact

according to the truth, if the evidence is such as to lead them to the conclusion that a valid first marriage existed: but they do, in my opinion, afford very good reason for increasing the *onus* of proof which lies on those who allege the first marriage, and afford very good reason for refusing to find the first marriage, though there is evidence which, if believed, would establish it, unless that evidence is in the opinion of the tribunal of such weight as to satisfy that *onus*. This observation goes rather to the weight of the testimony required as a matter of common sense, than to the law as to what is admissible.

Passing from these general observations to this particular case, it is, I think, proved that, in 1843, near *Bath*, Lord *Huntingtower* seduced, she says ravished, *Elizabeth Acford*, who claims, on the petition now before your Lordship, to be Lady *Huntingtower*, and, by him, to be mother of *Albert Edwin Tollemache*, born in 1863, on whose behalf she claims the earldom. She consented, however, after this, to go with him to *London* and elsewhere, and live with him under the names of Mr. and Mrs. *Tollemache*, which they seem frequently to have spelt as it is sounded, *Talmash*, and this continued till 1848. She bore to him three daughters, and then he, in 1848, turned her off and left her in destitution, so that she had to apply for parochial relief for herself and her three daughters. My Lords, even if it were shewn that she had misconducted herself, this would have been mean and ungentlemanly conduct on his part to her. As regards his three innocent daughters, it was utterly without excuse. But this is not the question now raised, which is whether there was a marriage. During the whole of this first period of cohabitation, both parties were of full age, required no assent to their marriage, and there was no legal impediment to or practical difficulty in their being married in *England* if they pleased. But such a marriage, if it took place in *England*, would be registered, and not only is there no register, but it is not alleged that any form of marriage ever took place in *England*. At that time and down to 1856, when 19 & 20 Vict. c. 96, was passed, an irregular marriage contracted in *Scotland* was valid, though by parties who had neither of them lived in *Scotland* before. And there is evidence before your Lordships that Lord *Huntingtower* and *Elizabeth Acford*, in June or July, 1844, some months after she had gone to live with him in *London*, and they,

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in *London*, had borne the names of Mr. and Mrs. *Tollemache*, were in *Scotland*, bearing there also the names of Mr. and Mrs. *Tollemache*, and there cohabiting. They stayed in *Scotland* about three or four weeks, and then returned to *England*, and never were in *Scotland* again. During that time there was no impediment to their contracting an irregular marriage in *Scotland*, which, if so contracted as to be valid in *Scotland*, would be valid everywhere. The allegation of the Petitioner, *Elizabeth Acford*, is that there then was such an irregular marriage. The question of law is, whether there is evidence sufficient, if believed, to establish such an irregular marriage; and then, if that is answered in favour of the Petitioner, arises the question of fact. Is that evidence such, and of such weight as, though the *onus* of proof is on those alleging the first marriage, to induce your Lordships, as judges of fact, to find that that irregular marriage did take place.

Before proceeding to express my opinion on those two questions, I think it well to say a word or two on the law of *Scotland* as to irregular marriages.

A promise made in *Scotland* to marry, *subsequente copulâ* in *Scotland*, constitutes an irregular marriage, but that promise, though it need not be in writing, must be proved by writing in *Scotland*; or, perhaps, if the Court in its discretion thinks fit to allow it, by reference to oath. Lord *Huntingtower* is dead, and, if alive, a reference to his oath would hardly have been granted. See *Longworth* v. *Yelverton* (1). That sort of irregular marriage may, in this case, be thrown out of consideration altogether, for neither now nor at any time has it been alleged that there was such a marriage.

Habit and repute in *Scotland* also forms an irregular marriage. There has been an erroneous popular notion that if a man and woman cohabiting together in *Scotland* call themselves husband and wife it constitutes habit and repute. There is a letter of the 5th of February, 1849, by the Petitioner to the late Lady *Dysart*, on which I shall have hereafter to make remarks when I come to deal with the question of fact. In that letter she expresses that popular notion thus, "He has acknowledged me as his wife by living together as such in *Scotland*."

My Lords, the question as to what is habit and repute in *Scot-*

(1) Law Rep. 1 H. L., Sc. 218.

land has recently been much discussed in several cases in this House. I think that the period over which what is alleged to be habit and repute extends must always be very important. I believe that there never has been a marriage by habit and repute established in any case where the period over which the habit and repute extended has been so short a period as three or four weeks. And, though I am not prepared to lay down as law that even a shorter time might not be, under peculiar circumstances, sufficient, I am not prepared to decide that it would. But I think that habit and repute is not constituted by the parties speaking casually of each other as husband and wife to persons to whom the introduction of the woman as his wife could neither be important nor significant. And if every word of the evidence here is accepted as absolutely true, it comes to no more than that Lord *Huntingtower* in *Scotland*, when taking lodgings or rooms at an inn for the woman with whom he cohabited, did not say that she was his concubine, so as to cause those who kept the lodgings or inn, if respectable, to refuse to take them in, but gave their names as Mr. and Mrs. *Tollemache*, which no doubt amounted to a representation that they were married, but did not amount to habit and repute. If she had been introduced as his wife to any persons in the society in which Lord *Huntingtower* then moved, especially if she had been so introduced to ladies, there would have been something to consider. It is, in the view of the case which I take, material, when deciding the question of fact, to remember that such a case might be made, and I think was put forward, by the Petitioner in her letter of the 5th of February, 1849, and probably on her behalf in *Jarrett's* action in 1853, though it is not now proved; and indeed is not relied on now.

But there is a further way of constituting an irregular marriage in *Scotland*. A contract between a man and woman, capable of entering into a contract, to be forthwith and thenceforward husband and wife, if serious, deliberate, and mutual, constitutes very matrimony, if there be no impediment. There are no technical rules as to the proof of such a contract. It may be proved as any other contract.

All these points were carefully considered and decided by this House in the case of *McAdam* v. *Walker* (1) in 1813. The facts

(1) 1 Dow. 148.

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there were that Mr. *McAdam*, owner of a large entailed estate, lived with Miss *Walker* as his mistress, and had by her children. On the morning of the 22nd of March, 1805, between 10 and 11 o'clock, he sent for three of his servants, and on their coming in said he had called them in to be witnesses of his marriage; he asked Miss *Walker* to rise, which she did. He took her hand, and said, "I take you three to witness that this is my lawful wife, and the children by her are my lawful children." Miss *Walker* did not speak, but curtsied in token of assent. There was no writing whatever. That afternoon, a few hours after this marriage, and before there could have been any subsequent intercourse, or time for habit and repute, Mr. *McAdam* shot himself. It was in that case that the Lord President (Sir *Islay Campbell*) said that he did not conceive that *McAdam* was of sufficient sound mind to contract at the time of marriage; and that at any rate he conceived the object of Mr. *McAdam* to have been not to make Miss *Walker* his wife, but his widow. How, said Lord *Eldon*, it was possible for him to make her his widow without making her his wife could not very easily be conceived.

Lord *Eldon* and Lord *Redesdale* gave very careful and elaborate opinions, and Lord *Eldon* proposed (1), "that the present judgment should be prefaced by some finding which might distinguish it from the loose cases noticed by the Bar. The finding might be of this nature:—

"1st. That at the time of the declaration of marriage in question Mr. *McAdam* was of sound mind and able to contract.

"2nd. That being thus of sound mind it was unnecessary to decide upon the question of previous insanity, or any circumstances connected with it.

"3rd. That by the declaration of marriage, and the facts and circumstances connected with this declaration, it appeared that the parties did, on the 22nd of March, 1805, intend forthwith to marry, and did accordingly contract very matrimony."

I may observe that there can be no contract of any kind between any parties unless there be mutual consent, but that if one of the parties use words intended to induce the other party to contract on the faith that he himself means to consent, and does thereby induce the other to contract accordingly, he is precluded

(1) 1 Dow. at p. 186.

from denying that he did so consent, and the contract is binding. The evidence here, if it proves anything, proves that Lord *Huntingtower* was consenting, but if the question rose as to the effect of a pretended consent to marry so given as to preclude him in an ordinary case of contract, I should be very unwilling to dissent from what is so well expressed by Lord *Stowell* in *Dalrymple* v. *Dalrymple* (1).

This being a question as to a Scotch peerage, your Lordships act upon the Scotch rules of evidence and not upon the English, where the laws of the two countries are not the same. They do differ on the questions as to when the rule against hearsay is to be relaxed where the hearsay evidence is that of a deceased person, and so far as any points arise on that difference, your Lordships have already decided. I do not think that the Petitioner, *Elizabeth Acford*, who is asserting that she was the wife of Lord *Huntingtower*, would, according to the law of *Scotland*, before the 37 & 38 Vict. c. 64, have been an admissible witness in a proceeding which, though not strictly a declarator of marriage, is very much of that nature, but since that Act I think she is an admissible witness, though one with a very strong bias, and whose evidence, therefore, must be received with proper caution. Whether in any case according to the law of *Scotland* the evidence of one witness would be sufficient, or whether in an English Court, where one witness is enough, it would be safe to act upon the evidence of a woman in such a position, when there was nothing either to contradict or confirm it, may be decided when the question arises. But though hers is the only direct evidence as to the fact of there being a contract to marry by *verba de præsenti* in *Scotland*, there is evidence in the present case proper to be considered as confirming, and also evidence proper to be considered as contradicting, her statements on that point. I take it that both by the law of *Scotland* and *England* evidence may be given of what is commonly called the *res gestæ*. It is not very easy sometimes to draw the line between what are *res gestæ* and what not; but when admissible as such, it does not matter whether the *res gestæ* took place in *England* or in *Scotland*. To put a case which has never happened, but which might happen,—suppose the question were whether there was a valid *Gretna Green* marriage, the only direct

(1) 2 Hagg. C. R. at p. 107; see *post*, p. 543.

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evidence as to the contract at *Gretna Green* being that of the woman, who swore that she was there married *per verba de præsenti*. It could hardly, I think, be disputed that evidence that the alleged husband ordered post-horses at *Carlisle* to take him and the woman to *Gretna Green* would be admissible as part of the *res gestæ*, and though happening in *England* and before the alleged ceremony, would, if proved by independent testimony, go far to corroborate her statement that she was then and there married. If only proved by her own testimony, of course it could add no weight to it. And so, if it were proved that immediately after the alleged ceremony the couple went to *England*, and there were by habit and repute treated as married people, though that taking place in *England* could not, possibly, constitute a marriage, it would surely confirm her testimony as to the alleged contract in *Scotland*; and so, if it were shewn that in *England*, immediately after the alleged marriage, she was reputed to be, and submitted to be reputed to be, a concubine, and not a wife, it would go far to shake her testimony as to the marriage. When things said amount to being part of the *res gestæ*, proof of them is admissible, whether the speaker is alive or dead, and whether he is called as a witness or not; but many things done or said by a witness are admissible on the other side to shake the credit of that witness, which would not be admissible if that witness were not called. I think the letter of the 5th of February, 1849, to which I attach much importance, falls within this class of evidence.

My Lords, it is of great importance that the administration of justice, especially where there is much difference between the parties in wealth and state, should not only be fair and impartial, but also that it should be beyond suspicion. This caused your Lordships to give the Petitioner more time and more opportunity to bring forward her case than she was at all entitled to claim. And this induces me to state the reasons for the opinion on the evidence to which I have come fully, and I fear it may be felt tediously, in detail.

I will now proceed to state what I understand to be the material part of the evidence given at your Lordships' bar; and what is the effect which it has on my mind, and, in my opinion, ought to have upon your Lordships' minds, in deciding the question of fact.

Elizabeth Acford, after stating that she was seduced, or, as she

asserts, ravished, by Lord *Huntingtower* in the end of 1843, says that he, by repeated promises to marry her, induced her to agree to go to *London* to live with him. She asserts that such promises were also contained in letters which she cannot produce, because they were taken from her and have been destroyed by Lord *Huntingtower*. And it does appear that some letters were so taken from her, and are not produced by his representatives. Whether the letters she specifies were amongst those, and whether their contents are accurately given by her, are matters depending entirely on her credit. A profligate man would readily make such promises by word of mouth to a woman and they could never, as the law then stood, be proved against him. A prudent man would not have made such promises in writing, as these letters would enable her to maintain her action for breach of promise of marriage. As Lord *Huntingtower* was profligate and not prudent there is no improbability in this part of her story. She lived with him in *London* and elsewhere, but represents that she had no further intercourse with him till she was, as she says, married to him in *Scotland*. But as in cross-examination she admits that she had lived in several successive lodgings provided by him under the name of Mrs. *Tollemache*, he visiting her under the name of Mr. *Tollemache*, that he often passed the night there, sometimes sleeping in a bed in her dressing-room, sometimes in a chair in her bedroom, and finally, when pressed, refusing to swear that he did not sometimes sleep on the same bed that she occupied, pp. 142, 143, I think that may be disregarded, and this motive for marrying her at all, did not exist. She asserts that he was all this time constantly promising to marry her, but did not do so because she was in bad health, which would be no impediment to performing the ceremony of marriage, and because they could not be married before the registrar till they had resided in one place for three weeks, but they lived together for six months.

Then comes a matter, which, if proved by independent testimony, would, as I have previously explained, be, in my opinion, important confirmation of her assertion that she was married in *Scotland*. I will read the passage from the shorthand writers' notes.

While you were at *Trevor Square*, did Mr. *Kenrick* visit you?—Yes; he used to dine there occasionally.

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With Lord *Huntingtower*?—Yes, and Mrs. *Kenrick*.

While you resided at *Trevor Square*, did any conversation take place between you and Lord *Huntingtower* with reference to a marriage?—Yes, after the dinner was removed *Huntingtower* requested Mr. *Kenrick* to be all attention, as he had me up from my parents expressly to make me his wife, and he meant to take me to *Scotland* and marry me there according to the laws of *Scotland*, because he had asked Lady *Dysart's* consent, and she had refused; she would not give her consent to it. He said he was determined to make me his wife, whether she would consent or not, and that he was determined to take me to *Scotland* and marry me by the Scotch laws.

Was Mrs. *Kenrick* present on this occasion?—I think so. I cannot be sure. I imagine she was there. I think she dined there that day, and *Kenrick* advised Lord *Huntingtower* to seek professional advice, as he did not know the real mode of the Scotch marriages, or something to that effect.

Was that the only conversation, or were there other conversations?—A great many.

Whilst you were at *Trevor Square*?—Whilst I was at *Trevor Square*; and I said that I should return to my family again. I was very wretched and very miserable.

Did you say why?—Well, yes; because he did not seem to carry it out so quick as I considered he ought to have done, and one obstacle was put and then another, money matters, I believe, not in his feelings towards me, for he was very much attached to me.

You said just now, "Because he did not carry it out so quick;" what did you mean by that?—Because he did not carry out the marriage so quickly as I thought he ought to have done, and I told him, I threatened him, I would go home to my family again, and I would never see him any more, and the world must know of his conduct about me. I did not hold it out as a threat to him; I held it out as I considered I was justified in doing so. And he said, "Dearest, it shall be carried out if I live, and before another month;" and then after seeing his family, I think his mother, Lady *Dysart*, gave him some money, and he went to *Scotland*, and he told his mother he was going to take me there to make me his wife.

(Mr. *Shiress Will*:) Did Lord *Huntingtower* tell you the reason why he went to *Scotland*?—Yes, he told me that he should go to *Scotland*, and he should take a house in order for us to live down there, and he explained the marriage laws to me; he explained them to me in this way; he said if he went to *Scotland* and made a vow before witnesses that we intended to become man and wife, that would be a legal marriage.

That he told you before going?—Yes, before going; and he said, "*Lizzie*, you had better accept of it in that way." I said, "It is not a proper one; it is a reckless one." He said it was not so if it was carried out in a true spirit; and I consented to go, with a good deal of persuasion. At least, he went first, and he took the house *Grecian Cottage*, *Trinity*, *Edinburgh*, and in the meantime Mr. and Mrs. *Kenrick*——

He went first?—Yes, and he was away a week.

And then he returned?—Then he returned.

What did he say to you when he returned?—I was boarding at the *Kenricks* then, and he said that he had taken the house down there, *Grecian Cottage*, in order to make me his wife, and that I was to come to *Scotland*; and I objected

to it, and Mrs. *Kenrick* said, "Well, do not be foolish." She said, "You go. Let him do it in his own way." I said, "I will not go with him;" and he said, "Very well, then I will soon determine upon that point. You need not go—you can follow me;" which I did do.

Then he went down to *Scotland* again?—Yes.

Then did you hear from him?—I heard from him, and the *Kenricks* heard from him.

What has become of the letters?—They were along with all the rest.

What did he say in the letter to you?—He spoke very affectionately to me, and begged of me to keep up my spirits and everything should go right and proper; that he meant honourably to me from the first moment; that he could not live without me, and that none of his family should ever stand as a bar between him and me in becoming man and wife.

Then did you go down to *Scotland*?—I went down in a steamship called the *Clarence*. Mr. and Mrs. *Kenrick* came to *Blackwall*, and we dined there; and then they saw me on board, and handed me over to the captain. We left there on Saturday night between 9 and 10 o'clock, and we ought to have arrived on the Tuesday night, whereas by a severe storm we did not get in till the Thursday evening, and *Huntingtower* was very unhappy and miserable indeed; he thought we were all drowned.

There is no misapprehension as to what she means to assert as to Mrs. *Kenrick's* knowledge of all this, for when on cross-examination she is asked—

"Why did you not go with Lord *Huntingtower* to *Scotland*?"—Her answer is, "I followed him. I did not go with him. He wished me to go, but I would not. Mrs. *Kenrick* blamed me for it. I said, I do not care, I will not go with him. I stopped at her house." And afterwards, when she is cross-examined as to a dinner which she said was given at *Greenwich* on her return to celebrate the wedding, and asked if there were any ladies there present, and says, "Three, one of whom was Mrs. *Kenrick*," she is asked, "Mrs. *Kenrick* knew perfectly that before you went to *Scotland* you were not married?" and answers, "She was perfectly aware of it, and she arranged matters with Lord *Huntingtower*, my stopping there, and their seeing me off at *Blackwall*, and we dined together there. They were Lord *Huntingtower's* friends, not mine.

Mr. *Kenrick* is dead. He was still alive in 1853, when *Jarrett* brought his action, as to which I shall have more to say. Mrs. *Kenrick*, now Mrs. *Steggall*, is alive. Your Lordships adjourned the proceedings for a fortnight that she might be, if possible, produced as a witness. She was produced, and instead of confirming *Elizabeth Acford's* testimony contradicted it. She says that when first she saw *Elizabeth Acford*, Lord *Huntingtower* introduced her as his wife, and said that they had been married three days before in the country (which, if he said it, was a falsehood, but it is by no means incredible that he did then tell a lie), and that she

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always believed them to be legally married, and never heard of their being in *Scotland* at all. She adds what, if she is giving evidence *bonâ fide*, shews both that her memory has greatly failed her, she being now an aged woman, and also that the intimacy between her and Lord *Huntingtower* and *Elizabeth Acford* has been greatly exaggerated. For she says that she continued to see them, and they continued to live together, till she and Mr. *Kenrick* went to *New Zealand* in 1852, from which they returned in 1853. Now we know both from *Elizabeth Acford's* testimony, and from written documents, that in 1848 *Elizabeth Acford* was discarded by Lord *Huntingtower*, he alleging, truly or falsely, that she had a clandestine correspondence with Mr. *Kenrick*, and that, in 1849 and 1850, she was in receipt of parish relief, and in 1851 Lord *Huntingtower* was married to Miss *Burke* and living with her. I see no reason to doubt that this witness is speaking what she now believes, and though her memory has much failed her, I think that as long as she remembered anything at all about the matter she could hardly forget what *Elizabeth Acford* says if it was true. I may add that in 1853, when *Jarrett's* action was tried, Mrs. *Kenrick* was a younger woman, and must have had a much fresher recollection of everything. I think, therefore, that there is here a conflict of testimony as to a material part of *Elizabeth Acford's* evidence.

I resume reading the notes of her evidence where I left off in 1844:—

Did anybody then meet you?—Yes, *Frederick Spicer*, his man servant, with a carriage and a pair of horses; and he saw to my luggage, and they drove me, he and another man, to this *Trinity Cottage*, within three miles of *Edinburgh*; and there Lord *Huntingtower* received me on the lawn; he was very kind and very affectionate.

Will you state to their Lordships all that passed; you say that Lord *Huntingtower* received you upon the lawn?—Yes, he received me upon the lawn, and the first thing he did he shook hands with me; he was thankful, he said, I had arrived after the storm, and he presented me with a white rose; and then he gave me his arm, and I went in the house, and then he called his man-servant, and he said, "*Fred*" (or *Frederick*, or something) "you must be our clergyman. I have brought Miss *Acford* here expressly to make her my wife, and whether I live or die, always stand up for her." He said, "My family would do anything rather than that I should marry this lady, but my object is to bring her out as my wife, which she deserves;" and he placed his hand on my shoulder, and he said, "I now make you my wife in the presence of *Frederick Spicer*."

Did *Spicer* say anything?—*Spicer* said, "I will, my Lord."

Did you say anything?—I said, "Yes," I took him for my husband.

Do you remember what you said?—No, I cannot exactly remember at the moment. I said "Yes," I think.

Will you tell us in your own way what else happened?—Then in the course of the evening (it was daylight then up to 8 or 9 o'clock) he gave me a ring, which I have now got on my hand. Do you wish me to produce it?—Yes, certainly.

It was a wedding ring, and he put it on my finger, and he said, "Dearest you are now my wife." That is the ring (*producing a ring*). I cannot wear it on my wedding finger. Would my Lords like to look at it?

Is it an ordinary wedding ring?—It is an ordinary wedding ring. It is ten years ago that I left off wearing it simply because my finger swelled. It got too small for me. I can now wear it on my little finger.

"That you say is the ring which Lord *Huntingtower* gave you?—That is the ring which Lord *Huntingtower* gave me.

On the evening of the first day you arrived?—On the evening of the first day I arrived.

Did anything else pass on that day that you wish to tell us; any other conversation, or anything of the kind?—I said, "Is that all the ceremony?" and he said, "Yes," it is quite enough." He said, "*Fred* has been our clergyman, and he will answer for it," or something to that effect. With that I told him I was scarcely contented, but he said, "Not so, it is legal, and my father being a Scotch peer will make the marriage more binding. It is a true marriage." He said, "And I can never marry any other women hereafter."

What did you do or say to that?—I said, "I was content," "I was satisfied," and I considered myself from that hour to be the wife of Lord *Huntingtower* always, honourably so; and I am sure I never had any doubt upon it. I felt that it was right and proper, because he had told me so, and then I made inquiries privately, unknown to him, and I was told also that it was a legal marriage.

Have you told us all?—No, there was no female servant that day, and in the morning she arrived, a woman called *Margaret Ritchie*, I believe, and she came, and then he called in *Frederick Spicer* and *Margaret Ritchie*, and then repeated the same words, and said, "I have brought Miss *Acford* (or at least she is now Lady *Huntingtower*) here to *Scotland* to make her my wife, and I call you two as witnesses to the marriage." He said, "My mother, Lady *Dysart*, has written a letter to me calling me a fool, and a gull, for taking my wife" (as he called me then) "to *Scotland*; but I defy the whole of them." He read part of Lady *Dysart's* letter to the two servants, and she said in the letter, "For ever afterwards, *Lionel*, you must call that woman your wife; you can never marry again." She was indignant, of course, but of course there it was. He said, "Now, *Frederick*, if anything happens to me, always stand up that this lady is my legal wife;" and he said "I will, my Lord."

Was that all that passed in the presence of *Spicer* and *Margaret Ritchie*?—There might have been more said, but I think that is about all.

How long did you and Lord *Huntingtower* remain at *Grecian Cottage*?—It was some weeks; it was over three weeks, I believe; it might be four, and it might be more than that, but I do not think it was. From that evening we lived together as man and wife; we cohabited together as man and wife from

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the hour he made me his wife by saying those words in the presence of his servants.

Up to that time had you any intercourse with him after what passed at *Southstoke*?—Certainly not. My health was not sufficiently adequate to anything of the kind; and not only that, but my mind and feelings were quite in disgust about it, or having it alluded to.

I have already expressed my opinion that the way in which the two treated each other after this alleged contract of marriage, in *England* is admissible as part of the *res gestæ*, and may be of weight as confirming or as shaking the credibility of the evidence of *Elizabeth Acford*, which is the only evidence directly proving the contract in *Scotland*, which, according to the law of *Scotland*, made very matrimony.

Their first daughter was registered as a legitimate child. This was done by her, she says, at his request. The second daughter was registered, and the registry signed by Lord *Huntingtower* himself, on the 2nd of January, 1847. It describes the child as the legitimate child of *William Lionel Talmash*, and the mother as being *Elizabeth Talmash*, formerly *Acford*. This is, I think, the only real confirmation of her story. And it is strong confirmation, for (though nothing done in *England* could make matrimony) such an act as this, registering the child as legitimate, though by what was practically a fictitious name, tends to shew that he was then acting as if she was his wife, and so confirms her statement that enough had taken place in *Scotland* to constitute matrimony. This must be given its due weight in her favour. The other supposed confirmations came to nothing. General *Harrison* is called and gives evidence to the effect that he became acquainted with Lord *Huntingtower*, then living in a very disreputable way under the name of Mr. *Tollemache*, with *Elizabeth Acford* under the name of Mrs. *Tollemache*; and that in 1847 he had a conversation with Lord *Huntingtower* which, if accurately remembered after the lapse of more than thirty years, shews that Lord *Huntingtower* then told a story as to which I shall only say that it is quite at variance with what she says. And that, profligate as it was for him to speak so of any woman, it is to me quite incredible that even Lord *Huntingtower* should speak thus of a woman whom he was then treating as his lawful wife.

From 1844, when they returned from *Scotland*, till 1848, Lord

Huntingtower and *Elizabeth Acford* continued to live together. She does not pretend that she ever saw or spoke to one of Lord *Huntingtower's* relatives. In 1848 she was staying at a Miss *Pottle's*. It appears that the lodgings had originally been taken by Lord *Huntingtower*, it does not quite appear when, under the names of Mr. and Mrs. *Langford*. *Elizabeth Acford* had, she tells us, became convinced, probably quite correctly, that Lord *Huntingtower* was cohabiting with another woman. He had asserted, she says falsely, that she had improper communication with Mr. *Kenrick*. There were scenes between them, and he, she says, took from her by force various letters, and then this occurred. I will read her own words as appearing in the shorthand writer's notes at page 79.

What did he do with those letters after he had broken open the box?—He took them away. I do not know what he did with them. He said, "Miss *Pottle*, I wish to speak to you," and she said, "Walk in here." So he did, and he said, "This lady is not my wife," Miss *Pottle* said, "What right then had you to bring this lady here?" He said, "Well, my family say she is not my wife." She said, "That has nothing to do with me what your family says. You brought her here and introduced her as your wife, and I believe it; you have sworn it to me." He said, "I am not going to pay for her board and lodging here. Turn her out." I said, "You cruel brute." "No," says Miss *Pottle*, "she shall not be turned out. I will do what is right by this unfortunate lady, and you shall pay for it," and so she did. She kept me and my children and servants, and she brought an action in the *Bromley* County Court, and she recovered the money for our board and lodging.

Do you know of your own knowledge that Miss *Pottle* brought an action against Lord *Huntingtower*?—Yes, she subpœnaed me in the case; so I attended.

Against whom did she bring the action?—Lord *Huntingtower*.

In the *Bromley* County Court?—Yes.

Were you present in the County Court on any of those occasions?—Yes, and I was examined by the Judge.

Were you a witness?—I do not know; they subpœnaed me.

Did you give evidence?—They asked me several questions, and Lord *Huntingtower* had got a number of professionals there, and he every now and then looked up in my face, and was going to say something to me, and then ceased. The Judge said, "It is evident that you have made yourself liable to support this lady as your wife, and it is your duty to pay the bills," and it was ordered so, and they recovered the money at different times, and I understood that he got the money from Lady *Dysart*, because his valet happened——

This, you say, was at the *Bromley* County Court?—Yes, in *Kent*.

Can you remember when it was?—It was in some part of the winter. I know it was very cold. I was then nursing my third dear baby, a young baby. She must have been about five months old. I nursed her till she was eight months old.

Do you mean in the winter of 1848?—The year that my last child was born. It was a short time after we travelled up, you know.

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(Lord *Watson*): How many times was Lord *Huntingtower* sued in the County Court?—Three times, I think, by the same lady. The Judge told her she could recover her money at all times.

My Lords, at that time, and until the 11th of July, 1853, when the 17 & 18 Vict. c. 99, came into operation, a wife was not, in *England*, an admissible witness against her husband, so that, appearing as a witness against Lord *Huntingtower* was an assertion that she was not his wife, and, so far, is a contradiction to her main story. I do not, however, attach any weight to this, as she, probably, was not aware of the law of evidence. If the Judge's decision was that, wife or no wife, Lord *Huntingtower* had made himself liable to Miss *Pottle* till the contract with her already made had expired, it was perfectly right; if he said that he would be liable to her on any fresh contract entered into afterwards, I think he was wrong, but I do not think he can have so said. At all events, Miss *Pottle* did not continue to keep her, and she fell into great distress, and applied to Lady *Dysart*. Two letters, dated in December, 1848, and January, 1849, are produced, signed *E. Acford;* for some reason, I do not inquire what, the correspondence was afterwards carried on by her as *E. Ackland.*

I have already expressed my opinion that, though nothing done or said by her could either make a marriage, if there was not one, nor undo the effect of the marriage, if there was one, yet, when she is called as a witness, it is competent for the other side to give evidence of any statements made by her for the purpose of destroying her credit; the weight of such evidence, of course, varying according to circumstances. It will be in your Lordships' recollection that she says now that Lord *Huntingtower*, in 1844, explained to her what was the law of *Scotland*, with an accuracy not to have been expected from him, and that she has remembered it ever since, with a tenacity of memory rather surprising, and must, of course, have remembered it much better in 1849. I may add also that it appears that in 1865 she received a pamphlet published soon after the *Yelverton Case*, which did contain a statement of the law of *Scotland* such as she now says she knew from 1844; and it is a part of her evidence now that not only had she believed Lord *Huntingtower's* statement that he had told Lady *Dysart* all about his marriage, but that she had read a letter from Lady

Dysart to him to that effect. I will now read her letter of February, 1849, correcting the bad spelling:

Princes Square,
5th February, 1849.

Madam,—With thankfulness and gratitude to you do I acknowledge the receipt of your kind letter, with five pounds enclosed.

I will attend to all your wishes in every respect, and shall be glad to inform you the moment matters are finally arranged on the part of Lord *H.* if he will do anything for me. I have no doubt, Madam, with your kind interference, his Lordship's feelings may alter towards me and his poor children. I am still willing to give up the letters, as I do not wish to hold any papers of His Lordship's, that I may the sooner forget that I ever knew such an unhappy man; but in the faces of his children do I see the very image of himself, which calls to mind all my wretchedness. You say, Madam, in your letter that you should like to know what His Lordship's letters contain that is of importance to me. They all tell that he has acknowledged me as his wife by living together as such in *Scotland.* From that time, in the year 1844, he gave me his name, and introduces me as his wife to every one. He himself has had all three of the children registered in the name of *Tollemache*, and I always considered myself a married woman from that time, and he has often said if I did not feel quite safe he would take me to an English church and make me his wife openly, as he could not be happy without me, but that he should be discarded by his family, but that he did not mind; but out of feelings to his noble family and birth, I did not wish him to do so, as I have often told him if he had married a lady in his own sphere it would have been a comfort to himself and friends, but this I could not persuade him both before and since the fatal occurrence that took place between us. If I had studied my own interest and future respectability more than I did in that case, I should now have been a happy woman. I could not bear the thought of one so noble as himself to share the fate with one so humble, if his family should discard him; but he said in one of his letters, "Let us rather beg our bread together than ever part, for we were intended for each other, and no one shall put us asunder." The task, Madam, is too painful for me to dwell on, otherwise I should like for you to know more, and I should like to send you a copy of all His Lordship's letters. I then think you, as a mother, could pity me, and see how cruelly I have been dealt with by His Lordship; but I do not wish to hurt your feelings or injure Lord *H.* in your kind estimation towards him, for he is to be pitied by every one. I sincerely trust he will see his folly some day, and he may yet be a comfort to you and all his family. He has my kind wishes. Madam, with regard to your name being brought up in the *Bromley* Court, the question was not asked of me if you gave me any money. It was, "If I had received any from Miss *Toone* while I was at Mr. *Pottle's*?" I said, "No, I had not." I was then asked, "If Mr. *Toone* gave me anything when I saw him?" I said, "One sovereign." Madam, your name was not spoken of to me in Court.

I am sorry to inform you, Madam, all three of my children are very ill, and I have not any one to do the slightest thing for me. I am quite worn out for want of rest, and no one to speak to. My life is a burden to me.

I am, Madam,

Your very obedient,

E. Ackland.

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Every man must judge for himself whether this is such a letter as would be written if her present evidence were true. To me it seems a very important contradiction, tending to shew that her whole tale as to the contract *per verba de præsenti* is an afterthought.

Lady *Dysart*, after supporting her for some time, withdrew her further assistance, and *Elizabeth Acford* was obliged to apply for parochial relief; in 1851, as already mentioned, Lord *Huntingtower* openly married Miss *Burke*. She says that various people believed she was the right Lady *Huntingtower*, pitied her, and assisted her. I think this very likely, for there are always people who, from a generous feeling, will help one whom they think oppressed, and always people who will take up as a speculation causes likely to lead to a lucrative compromise. Now, it is the law of *England* that, when a wife is turned off by her husband without fault of hers, and left destitute, she carries with her an authority implied by law to pledge her husband's credit for necessaries proper for the wife of a man in his degree. On this doctrine Mr. *Jarrett* acted; he supplied *Elizabeth Acford* with necessaries certainly by no means in excess of what would have been proper for the wife of the eldest son and heir apparent of an earl, and then brought an action against Lord *Huntingtower* for those as supplied on his credit to his wife, who as such had pledged it. The action was tried before Baron *Alderson* at the *Kingston* Spring Assizes, 1853. At that time the wife could not be received as a witness against her husband, and those resting their case on *Elizabeth Acford* being the wife of Lord *Huntingtower* could not call her as a witness. But all other evidence that could have been brought forward now could have been brought forward then, and inasmuch as the action was against Lord *Huntingtower*, everything which he had said or done was admissible as against him, though it would not, unless part of the *res gestæ*, be admissible now. If she, in telling her story to *Jarrett* and his legal advisers, rested her marriage entirely on habit and repute in *Scotland*, not bringing forward the story of the ceremony, the inference is strong that the story of the ceremony is a subsequent invention. If she did tell that story, they knew that *Frederick Spicer*, who was then alive, and *Margaret Ritchie*, who was then

alive, and with both of whom *Jarrett* was in communication, were very important witnesses. And they must have known that Mr. *Kenrick*, who was then alive, and who if not friendly to *Elizabeth Acford* was at least then hostile to Lord *Huntingtower*, and Mrs. *Kenrick*, who then, near thirty years ago, was not likely to have forgotten anything, would be very important witnesses. I do not attach much weight to Lady *Dysart* being then alive, for she was so hostile a witness that no one would have thought of calling her. If, however, the case put before them was only that of habit and repute, these witnesses probably would carry the case no further than the letters mentioned in the letter of the 5th of February, and they might well hope that they could make such a case from them as to force Lord *Huntingtower's* counsel either practically to admit the truth of the case, or to call him as a witness and subject him to cross-examination. What evidence they did call we do not know, but they failed in their action. After this *Elizabeth Acford* went to *Ham House*, where Lord and Lady *Huntingtower* resided, and to *Grosvenor Square*, where Lady *Dysart* resided, and made such a disturbance that finally it was agreed that an annuity of £60 should be settled on her in her maiden name, she giving up all letters and all claim on Lord *Huntingtower*, and a formal deed, dated the 3rd of May, 1854, and made between *Elizabeth Acford*, spinster, made in the proper form for securing an annuity to a woman who had been his mistress, but all connection with whom had ceased since the middle of 1848, was prepared and executed by her.

Her explanation of this is given on cross-examination:

I was obliged to do it or starve and see my children die at my feet; there was no help for it whatever. He said, "I wish you to do it, *Lizzie*, though it is apparently against yourself; you know you are my legal wife." He said, "Miss *Burke* married me with her eyes open; she was thoroughly and purely aware that you were my wife; she knew I had married you in *Scotland*."

So that your view was that your executing this deed, which described you by your maiden name of *Acford*, and described your children as *Acford*, and in which you covenanted not to molest him at all, would have no effect whatever? —Not the slightest effect. He said it did not matter what I did about that, and that if I signed it in my maiden name it would never invalidate my marriage to him.

At that time you were thoroughly and completely convinced that you were married to him?—Most assuredly.

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How far that prevents the effect of the execution of this deed in shaking her credit your Lordships must judge. In 1857 she and Lord *Huntingtower* resumed cohabitation. He took a house and maintained an establishment for her whilst he was living with the lady whom he had married in 1851. An agreement was entered into between them in her maiden name as *Elizabeth Acford*, providing for the education of her daughters. As I have spoken with severity of Lord *Huntingtower*, it is fair to say that for a time he behaved well and properly to his daughters, and always seems to have been, after his fashion, kind to them, though his later conduct can only be palliated on the supposition that he was insane.

Towards the end of 1859 Lord *Huntingtower* took up with a woman called *Emma Dibble*, with whom he lived till his death under various names. Your Lordships will remember that it was in 1860 that Lord *Huntingtower* finally ceased to live with the lady whom he had married in 1851, and with whom he lived as his wife till then. What follows I will read from the shorthand notes of *E. Acford's* cross-examination:

You were then convinced that you were his wife?—Certainly. I am still convinced that I had an undoubted right to receive him as my husband.

And you were convinced that your children were legitimate?—Most assuredly.

You had not any doubt about it?—Not the slightest. I felt myself an honourable woman.

Just look at that (*handing a letter to the witness*), is that your handwriting?—Yes.

I will just read you this letter:—

"*Sherborne Street*,

"14th December, 1859.

"*Huntingtower*,—If you will give me £1000 I can get married within a month, and in case the man might do as you have done—leave me to the mercy of the world, an outcast and a beggar—I will thank you to have it all made over to myself, so that I may do with it as I think fit. An early reply will greatly oblige," and then it is signed "*Elizabeth*." You wrote that letter, did you not?—Yes, I wrote it, and I perfectly well remember it. I know the conversation that I had had with Lord *Huntingtower* prior to my writing it.

Were you proposing or intending at that time to get married?—Well, I never intended it, but I said to Lord *Huntingtower*, "You have thought proper to get married again, why should not I?" He said, "If you dare to get married again I will always claim you, and will blow the fellow's brains out," or something to that effect, so I wrote in a playful manner.

This was not seriously written then?—It was not seriously written; it was written in a playful manner. I never felt I was at liberty to marry again, only

I put the question to him when he was with me, and he said, "If you ever marry again I will always claim you, and I will blow the fellow's brains out." That was just his expression, and then in a playful, teasing manner I wrote that letter. I perfectly well remember it.

That letter did not express your real intentions at all?—Certainly not. I did it to tease him.

You knew, did you not, that you would be committing bigamy if you married again?—I was aware that I could not marry again. Certainly I was.

And that you would be committing a crime if you did?—I should be committing bigamy, as I told him he had done.

Then you are quite sure that this was not done seriously?—On my oath, I am sure.

He did not send you £1000, did he?—No, he never sent me any money in the shape of £1000 or 1000 sixpences. He came to me on the receipt of that letter, and he was very indignant at my conduct, as he styled it.

He was very indignant that you had suggested it?—Yes, that I should think of marrying again.

You suggested, you know, that the money, if it were paid to you, should be settled on you; had you discussed that matter with Lord *Huntingtower?* Perhaps you do not quite understand me. You suggested in this letter, "I will thank you to have it all made over to myself, so that I may do with it as I think fit."—Yes, I did (*laughing*). I beg pardon if I smile, I cannot help it. I knew it was——

That it was a joke, in fact; that it was meant as a piece of fun?—Yes, it was meant as a piece of fun from beginning to end, because he was telling me this. He said to me, "Dearest, if I had a thousand women to choose from, I should never have met with one like yourself, so quiet and so discreet." I said, "Decidedly more so than you have been, for you have married again and committed bigamy," and I said, "Do not be surprised if I were to do the same."

It was banter and fun?—Yes, there was no seriousness one way or the other. No importance must be attached to it; it was a mere playful bit of foolery between us.

I have not read the whole of this letter. I had not the whole of it copied; I had only the first page.—I do not know, I am sure, what is written there.

I will read it.—If you read it I will acknowledge it.

"P.S. I shall expect that you will allow the children to write to *me on the first of every month* without coming through your hands; I ought to have heard again from them by this time. *E.*" That is your writing, is it not (*shewing the postscript to the witness*)?—Yes.

The first sheet is signed "*Elizabeth*?"—Yes, he would not allow me to sign in any way else.

The postscript is signed, as postcripts generally are, with the initial?—Yes, I acknowledge that, decidedly. I was backward in my hearing from my children.

You were very fond of your children, were you not?—Yes; it nearly broke my heart his keeping them away from me nearly for ten years; he never allowed me to see them hardly.

You would not willingly have done anything to injure your children?—I would have sacrificed my life for them; I did my health.

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Was the postscript seriously intended or not?—The postscript was seriously intended.

The first sheet is pleasantry, but the postscript is serious?—The postscript is serious; the other was a piece of foolery done to tease him more than anything else.

Is that your handwriting (*handing a letter to the witness*)?—Yes.

And this also (*handing an envelope to the witness*)?—I will honestly acknowledge everything.

I am quite sure you will; the envelope also is in your handwriting, is it?—Yes.

This is a letter written from 34, *Sherborne Street*, and dated the 12th of February, 1860; that is a few months after the last?—Yes.

And it is addressed to "*P. R. Welch*, Esq., 2, *Paper Buildings, Temple*?"—Yes. That was a gentleman he used to send to me with money.

You knew who Mr. *Welch* was?—Yes.

A barrister?—Yes, he was a barrister.

And a friend of Lord *Huntingtower's*?—Yes; he frequently used to call.

Afterwards he was, I think, a commissioner of bankruptcy at *Leeds*?—I did not know him then; he was practising in the *Temple* when I was introduced to him, and for a long time afterwards I used to call there by Lord *Huntingtower's* request.

He used to give you money sometimes?—Yes, he used to give me money frequently from Lord *Huntingtower*.

Is Mr. *Welch* dead?—I heard so.

The letter was read as follows:—

"34 *Sherborne St.*,
"February 12th, 1860.

"Sir,—With reference to the subject that I were speaking with you upon, I beg to repeat that I can get married immediately, and will do so if Lord *Huntingtower* will give me £500. I have already written to His Lordship upon the same subject. An early answer will greatly oblige,

"Sir,—Yours most respectfully,
"*Elizabeth Acford*."

"To *P. R. Welch*, Esq."

That was your letter?—Yes. Mr. *Welch* was quite aware that I was going to write that letter.

Was that pleasantry?—It was more to get money from Lord *Huntingtower* than anything else. Mr. *Welch* was fully aware of it. I do not know that Mr. *Welch* did not suggest it to me.

You will not swear that, will you?—I should not like to swear it; but I am almost positive that I could. It was merely done in a business transaction; it was never intended. I never entertained seriously anything of the sort. It was merely done for mischief.

Do you represent to their Lordships that that letter was also written in a mischievous spirit?—Most assuredly it was, because I always felt myself married to him, and I always told Mr. *Welch* so; Mr. *Welch* said he could say nothing in favour of Lord *Huntingtower* against it; he told *Huntingtower* so.

Did you ever say to Mr. *Welch*, or to anybody else, that at that time you were in a position to get married to a respectable householder in *Islington*?—I daresay it was said for me.

Did you say it?—I do not know whether it was in those words or not.

Did you tell Mr. *Welch*, when you were pressing him for money, that you could get married, and that you could get married immediately, if you liked, to a respectable householder in *Islington*?—Well, I had several offers of marriage from different parties, but they did not know that I was a wife; they thought that I was a widow lady.

The people in *Islington* thought that you were a widow?—They thought that I was a widow lady; and when I had those offers of marriage I felt quite indignant.

In 1860, or at the latter end of 1859, had you an offer of marriage?—I do not know, really.

Just try and recollect?—I might have had; I really cannot say; I never entertained it.

You had several, had you not, when you were living in *Sherborne Street*?—I might have had.

You might, of course, Madam; but is it the fact that you had?—Yes. Lord *Huntingtower* made me sign my name like that; he said it was better to do so.

Who did?—Lord *Huntingtower*; he said, "You had better sign yourself "*Elizabeth*;" do not sign it "*Huntingtower*."

It was quite natural that you should have signed it "*Elizabeth*"; but let me draw your attention to this letter to Mr. *Welch*. About this time, when this letter was written, did you not tell Mr. *Welch* that you had had an offer of marriage?—Yes, I did in that letter assuredly.

And by word of mouth?—Yes; if he came to my house I might have done it.

By word of mouth, did you not tell him that?—Yes; and I told him he had better tell Lord *Huntingtower*.

Did you not tell him by word of mouth that you had got a very good offer?—Yes, I think I did.

And that you would get married if Lord *Huntingtower* gave you a sum of money?—Yes; I did not see why I should not get married, as he had done. I did not see why I should spend my days in abject poverty while Lord *Huntingtower* had committed bigamy; and Mr. *Welch* told me if I did I should be prosecuted. He said, "You can tell Lord *Huntingtower* that, if you like." I said, "I shall certainly tell him, and ask him for money."

When you told him that you had a right to get married as Lord *Huntingtower* had got married, you were serious in what you said?—I was not serious. I wanted Lord *Huntingtower* to give me up wholly and solely, or come and live with me altogether. I wanted him all or nothing.

If he would have given you up altogether ——?—But he would not; he would never give me up; never.

Please listen to me. If he had been willing to give you up altogether, and to give you a sum of money, you were prepared to get married?—I might have done.

You were prepared; this letter says so?—Yes, I had an offer.

What I have said is the truth, is it not?—I had an offer, but I never made up my mind to it.

Of the effect of this in shaking her credit your Lordships must judge.

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Then comes a very strange story, into which I shall not enter in much detail. It rests on the testimony of Mrs. *Whiting*, the eldest and only surviving daughter of Lord *Huntingtower*, and strange as it is, it is so confirmed by a variety of documents that I believe it. Lord *Huntingtower* had treated her well and sent her to be educated abroad. In February, 1863, she was sent for by him and brought to the house where Lord *Huntingtower* was living with *Emma Dibble*, sometimes under the names of Mr. and Mrs. *Digby*, and sometimes under the names of Mr. and Mrs. *Manners*. Then Lord *Huntingtower* developed a scheme of mingled ingenuity, folly, and wickedness. He told her that her position would be greatly improved if her legitimacy could be established, and that it could be established if she would go to her mother pretending to have run away from *Vienna* against his will, and instigate her to take proceedings to establish her marriage with him, which would have the effect of setting him free from Miss *Burke* and establish his daughter's legitimacy. That then her mother, thus proved to be his wife, might divorce him on the ground that he was living in open adultery with Mrs. *Dibble*, and then he would be able to marry Mrs. *Dibble*; that any respectable solicitor would take up her case on speculation, but if not he would furnish the money, but it was to be the most profound secret that it came from him. My Lords, I do not much blame Mrs. *Whiting*, then a mere child, for doing what a father who had always been kind to her commanded; and I think it superfluous to say anything as to Lord *Huntingtower's* conduct. *Elizabeth Acford* would not enter into this scheme, the certain effect of which would have been to destroy her annuity. He then refused to pay it. She brought an action on the annuity deed in her maiden name. He pleaded in bar that she was his wife, which she denied, and the issue thus joined was tried at the *Maidstone* Spring Assizes, 1865, before the Chief Baron *Pollock*. She was called as a witness, whether by Lord *Huntingtower's* counsel or her own does not distinctly appear. I will read what she now says on cross-examination as to her evidence from the shorthand writer's notes:

You were called to prove that you were Lord *Huntingtower's* wife?—I was not exactly called to prove that; their object, I believe, was to get the money.

Your object was to get the money?—I believe my solicitor's object was to get

the money. I do not know that they were prepared to ask the question about my being his wife, or otherwise.

What I want to put to you is this, when you gave your evidence before the Court, did you say a word about the ceremony that was performed before *Spicer*? —No, I did not.

Not a syllable?—No, not in Court.

Of course you knew all about it?—Yes, I knew all about it, and I knew I was his wife; but I did not think there was any occasion to say it when the man was claiming me as such. I did not bother about that.

You said no syllable about what we have called the "ceremony?"—No, not in Court. I was not called upon to do so.

You were sworn to give evidence, were you not, before you gave your evidence?—Yes.

At that time you knew you were married; you knew that the ceremony had been performed; you knew everything that you have told us to-day, or told us since you began to give your evidence?—I knew it, and I have spoken the truth.

Lord *Huntingtower* cannot have told his counsel of the contract before *Spicer*, yet if it had been true, or even if it had been asserted in *Jarrett's* action in 1853, he must have known it.

On this evidence the Chief Baron directed a verdict for the Defendant, subject to leave to move. A rule *nisi* was obtained, but cause was never shewn, Lord *Huntingtower's* counsel having consented that it should be made absolute.

I suppose they explained to Lord *Huntingtower* that the verdict if it stood would not affect Lady *Huntingtower's* rights; and that if he, contrary to all probability, succeeded in establishing that his marriage with her was bigamous, her friends would, in all probability, indict him for bigamy; and that after all he would not be a bit nearer his ultimate object of marrying *Emma Dibble*, for the Queen's Proctor would certainly intervene and prevent a divorce by collusion. Though Lord *Huntingtower* had no regard to his character, and I think I may say had by this time no character in the least worthy of his regard, he would hardly be insensible to the force of these considerations. But, whatever might be the reasons, the verdict was entered for the Plaintiff, and she received the money, and her solicitors the costs.

I have, for the reasons I stated before, gone through the evidence at, I fear, tedious length.

If the burthen of proof lay on those denying the first marriage, to prove that *Elizabeth Acford* tells a falsehood in asserting that

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there was a marriage *per verba de præsenti* in *Scotland* in 1844, I think there is ample evidence to justify a finding in their favour. But the burthen of proof being on the other side, and the question for your Lordships being whether the evidence is such, and of so satisfactory a nature, as to satisfy you affirmatively that there was such a marriage, I think your Lordships cannot hesitate. I, without the least doubt, express my opinion that it is not proved, and I advise your Lordships to find in the same way.

LORD WATSON (after alluding to some of the facts previously given, and stating that he would in future designate the lady styling herself "*Elizabeth* Dowager Lady *Huntingtower*" as the Petitioner) continued:—

It appears from the statements in the case for the Petitioner, and it is certainly established by the evidence, that although the marriage of Lord *Huntingtower* to Miss *Burke*, in September, 1851, came to her knowledge shortly after its celebration *in facie ecclesiæ* the Petitioner took no steps to have the validity of her alleged irregular Scotch marriage of July, 1844, or the nullity of the marriage of 1851, judicially declared; and that the legitimacy of *William John Manners* and the other children born of the marriage between Lord *Huntingtower* and Miss *Burke* was never impeached until these proceedings began in August, 1880. During the twenty-one years which elapsed between the date of their marriage and the death of Lord *Huntingtower*, and for eight years after that event, Miss *Burke* occupied, before the world, the position of Lady *Huntingtower*, his lawful wife and widow, and their children, from the time of their birth, held the unchallenged repute and *status* of legitimacy.

But, however unfortunate that result might be, it is undoubted law that, if it be proved to your Lordships' satisfaction, that Lord *Huntingtower* was married to the Petitioner in *Scotland*, and according to the law of *Scotland*, in the year 1844, his Lordship's subsequent marriage to Miss *Burke* in 1851 was utterly void, and the issue of that marriage are illegitimate. To use the language of Lord *Stowell* in the well-known case of *Dalrymple* v. *Dalrymple* (1), "the first marriage, if it be a marriage upheld by the

(1) 2 Hagg. C. R. 129.

law of the country, can have no competitor in any second marriage which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony, but there can be no second marriage; it is a mere nullity."

The burden of proving the alleged marriage of 1844 rests, of course, upon the Petitioner; but I venture to doubt whether the *onus*, which is always incumbent on the party alleging an irregular marriage, is increased by the mere fact of the other spouse having subsequently thought fit to contract a regular marriage. If the Petitioner, immediately after his marriage with Miss *Burke* became known to her, had brought a suit against Lord *Huntingtower* for restitution of conjugal rights, and had, in that action, adduced evidence sufficient, apart from any question of second marriage, to prove her own marriage to Lord *Huntingtower*, I am disposed to hold that the same evidence would have been sufficient to sustain the validity of that marriage, as in a question with the innocent wife and children of the second. But the second marriage is, in all such cases, an important circumstance, which may, when taken in connection with the conduct of the party challenging it, give rise to a presumption against the reality of the first marriage; and it is a material fact in the present case, that these proceedings have been instituted by the Petitioner thirty-six years after the marriage which she seeks to set up, and nine-and-twenty years after Lord *Huntingtower's* marriage to Miss *Burke*. It is obvious that, through the delay which has thus occurred, a great deal of testimony bearing on the alleged marriage of 1844, which would have been available seven or eight and twenty years ago, has been necessarily lost. The Petitioner's counsel strenuously argued that the circumstances of his client have all along been such that neither she nor her son can be held responsible for that delay; but I cannot accept that argument. Even if their long inaction was owing to their misfortune rather than their fault, that seems to me to be a consideration of no relevancy in any question with the children of Miss *Burke*. Their legitimacy was never disputed, they had no notice of the claims now put forward by the Petitioner and her son, and had notice been given, it lay with the Petitioner and not with them to take the initiative. In these circumstances I am of opinion that the

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status which the wife and children of the regular marriage of 1851 have so long been permitted to enjoy without molestation, raises a strong presumption in favour of their legal right to that *status*, and casts a corresponding *onus* upon the Petitioner. Wherever the evidence leaves room for reasonable doubt your Lordships ought, in my opinion, to presume in favour of *William John Manners*, and against the Petitioner and her son *Albert Edwin*.

The number of cases similar to the present is, happily, not large; but, so far as I am aware, in no other case save one, to which I shall shortly refer, has the challenge of a marriage on the ground that the husband or wife was one of two living spouses of a previous marriage been long delayed. Of the cases cited at the Bar, in *Pennycook* v. *Graite and Grinton* (1), *Dalrymple* v. *Dalrymple* (2), and *Longworth* v. *Yelverton* (3), the challenge was brought immediately after the party alleging the first marriage came to know of the second; whilst in *McGregor* v. *Jolly* (4), a period of nearly two years was suffered to elapse. But in the case of *Wright or Webster* v. *Wright, Trs.* (5), Mrs. *Webster*, whose paternity was not in dispute, raised, after her father's death in 1833, an action to have it found and declared that he had contracted an irregular marriage with her mother in *Scotland* about the year 1805. Her mother lived till 1833, but meantime, in 1815, nineteen years before her action was brought, her father had entered into a regular marriage by banns in *England*, of which issue were born. The late Lord *Moncreiff*, whose judgment was accepted by the Inner House, held that the proof led was insufficient, and his Lordship thus explains in his note the presumptions which he had, in the circumstances of the case, applied to its consideration. "The English marriage is a fact of very great importance in the cause, as bearing upon the reality of the proof, and affording presumptions both of fact and law against any equivocal, doubtful, or suspicious state of the evidence."

The case of the Petitioner is that she and the late Lord *Huntingtower* mutually consented to take, and did accept, each other

(1) Mor. Dict. 12,677.
(2) 2 Hagg. C. R. 54.
(3) 4 Macq. 745.
(4) Court of Sess. Cas. 1st Series, vol. iv. p. 259; Rev. on app. 3 Wil. & S. 85.
(5) Court of Sess. Cas. 1st Series, vol. xv. p. 767.

as lawful spouses, in the presence of witnesses, within a cottage then occupied by his Lordship, in the neighbourhood of *Edinburgh;* and it is beyond dispute that such mutual acknowledgment by a man and woman, between whom no legal impediment exists, with the real and present purpose of becoming spouses, is of itself enough to constitute a marriage according to the law of *Scotland.* When the deliberate interchange of consent *de præsenti* before witnesses has been fully proved, no further evidence is requisite, and no subsequent acts or declarations of the pair can make them other than married persons. As stated by Lord *Eldon* in the case of *McGregor* v. *Jolly* (1), "When you are satisfied that, according to the law of *Scotland,* there has been actually a marriage between *A.* and *B.,* no subsequent conduct is to be received in order to entitle you to say that that marriage, which has been actually had and actually celebrated effectually, is to be undone." But in cases where there is not *plena probatio* of such an interchange of consent, or in the case of a ceremony being proved, but a doubt remaining *quo animo* it was gone through, it is competent to inquire into the subsequent conduct of the parties towards each other. And if it be found that they afterwards lived together and were habite and repute married persons, and it appear that their cohabitation was referable to the antecedent ceremony, these circumstances will be sufficient to establish that the ceremony was intended to constitute and did constitute *ipsum matrimonium.* On the other hand, if it be found that the subsequent behaviour of the parties was not consistent with their having contracted matrimonial relations, that will suffice to discredit the ceremony, and negative marriage.

It appears to me to be essential, in dealing with the evidence in the present case, to keep in view the fact that the Petitioner does not allege a marriage by habit and repute. The possibility of such a marriage is excluded by the circumstances of the case. The law of *Scotland* accepts the continuous cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of *Scotland.* Co-

(1) Court of Sess. Cas. 2nd Series, vol. iii. at p. 189.

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habitation furth of *Scotland* will not constitute marriage, although it may be competently founded on either as corroborative evidence of a ceremony in *Scotland*, or as evidence that a ceremony proved to have taken place in *Scotland* was truly intended by the parties as a present interchange of matrimonial consent. Now the Petitioner and Lord *Huntingtower* were certainly not in *Scotland*, at the time the alleged ceremony took place, for more than a month—a period, in my opinion, short of what is required in order to establish a marriage by habit and repute: and any subsequent cohabitation had by them was in *England*. And, even assuming that the character of their cohabitation in *England* was such as would have warranted the inference of marriage if it had taken place in *Scotland*, the Petitioner can take no benefit thereby, unless she can shew that such cohabitation was distinctly referable to the alleged ceremony at *Grecian Cottage*. In my opinion, that ceremony is the leading fact which it lies upon the Petitioner to establish, and must be instructed by at least a substantial amount of reliable testimony, independently of inferences which may be drawn from cohabitation in *England*. To rest the conclusion that a ceremony must have taken place mainly, or in any material degree, upon such inferences, would go far to destroy the principle that a Scotch marriage cannot be derived from English habit and repute.

I shall now proceed to consider the evidence with the view of ascertaining how far it bears out the Petitioner's allegation of a marriage in *Scotland, per verba de præsenti*. One striking feature of that evidence is that the Petitioner herself is the only witness to that which is alleged by her to have taken place at *Grecian Cottage, Trinity*, and almost the only witness who speaks to the relations subsisting between her and the late Lord *Huntingtower* before and after their visit to *Scotland* in the year 1844. The parties to a declarator of marriage *per verba de præsenti* having now been, by the enactments of 37 & 38 Vict. c. 64, made competent witnesses, I see no reason why the direct and uncontradicted testimony of the person alleging the marriage, if corroborated to some extent by the indirect testimony of others, and supported by the facts and circumstances of the case, should not receive effect. But it will always be necessary, in a case of that kind, to test very strictly the statements given in evidence by a woman interested

in establishing that she held and holds the honourable *status* of a wife, and not the degrading position of a mistress, and that her issue are lawful children and not bastards. And in that view, and as bearing upon the credit to be attached to the evidence of the Petitioner, the relations which subsisted between her and the late Lord *Huntingtower*, before her alleged marriage of July, 1844, appear to me to be matter of more than usual importance. When a marriage by habit and repute is sought to be established by a woman who admits, or against whom it is proved, that her cohabitation with her alleged husband began in illicit intercourse, that fact, as was held by this House, in the case of *Cunningham* v. *Cunningham* (1), raises a presumption against her, which can only be overcome by strong evidence of a change in the character of this cohabitation. That presumption has not been held to apply, and cannot apply with the same force, when the woman sets up a marriage by declaration of mutual consent before witnesses; but it is nevertheless an important question in this case whether it be the fact the Petitioner lived in concubinage with Lord *Huntingtower* before they went to *Scotland*. The Petitioner denies that she did, but I have come to the conclusion that her statements upon this part of the case are inconsistent with the truth; and that conclusion compels me to regard her testimony, so far as uncorroborated, with suspicion.

The story which the Petitioner tells of her introduction to Lord *Huntingtower*, and of their mutual relations from that time until they met at *Grecian Cottage* is a very singular one. It would appear that the Petitioner, who had been in service at *Bathwick Rectory*, gave up her situation, in the end of the year 1843, and shortly thereafter became one of the inmates of a house at *Southstoke*, about five miles from *Bath*. It is needless to dwell upon the account given by the Petitioner of how she came to be there, which is in itself far from satisfactory; but, assuming it to be true, the inference is that she must have been inveigled thither by Lord *Huntingtower*, upon the false representation that she had been engaged as a servant by his mother, Lady *Dysart*. What occurred there according to her statement is,—that Lord *Huntingtower* professed an ardent affection for her, which she did not

(1) 2 Dow. 482.

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reciprocate, that she fled to her own room, in order to avoid his importunities,—that his Lordship followed, committed a violent and cruel rape upon her person, and, after his vile purpose had been effected, tried to soothe her by promises of marriage. At first, the Petitioner would listen to no terms of compromise; but, eventually, all means of escape from the house having been cut off, she accepted his renewed offers of marriage, but refused to have intercourse with him until she became his lawful wife. And the Petitioner solemnly asserts that Lord *Huntingtower* made no second attempt to have connection with her, and that she maintained her chastity inviolate until she had gone through a ceremony of marriage in *Scotland*, upon the faith of which she, for the first time, voluntarily submitted to his embraces.

My Lords, it is a remarkable fact that, even in these circumstances, this injured woman should not, the moment she was at liberty to leave *Southstoke*, have placed herself under the protection of her natural guardians, until such time as Lord *Huntingtower* was ready to fulfil his promises of marriage. Instead of that she went straight to *London*, to meet the man who had outraged her, and thenceforward lived in his company at hotels, and in various lodgings taken by him for his own and her accommodation. It is also significant that, from the time she joined Lord *Huntingtower* in *London*, the Petitioner discarded her maiden name of *Elizabeth Acford*, and they passed at their different residences for man and wife, being generally known as Mr. and Mrs. *Tollemache* or *Talmash*. They must, according to the Petitioner's own account, have continued to live together in this fashion for at least four months before they went to *Scotland* in the summer of 1844. And it does not, in my opinion, detract from the significance of these circumstances that, during that period, the Petitioner twice paid a visit to her parents at *Bideford*, and as often returned to *London* in order to resume her former course of life as Mrs. *Talmash*.

Notwithstanding the suspicious character of their cohabitation, as evidenced by her own statements, the Petitioner, in her examition-in-chief, took every possible occasion to reiterate the assertion that she had no intercourse with Lord *Huntingtower*. But, on cross-examination, the Petitioner was not only driven to admit that Lord *Huntingtower* paid visits to her bedchamber during the

night, but declined to negative the suggestion that he had also been in bed with her. From these circumstances, my Lords, it appears to me that only one inference can be drawn by a Court of law, that inference being that, during the period in question, the Petitioner cohabited with Lord *Huntingtower* as his mistress.

That such was really the footing upon which the Petitioner lived with Lord *Huntingtower* until July, 1844, derives strong corroboration from the evidence of the witness Mrs. *Steggall*, formerly Mrs. *Kenrick*. The Petitioner's testimony is to the effect that Mrs. *Kenrick* knew her position to be that of a chaste single woman, and was also aware of Lord *Huntingtower's* intention to make her his lawful wife; that she was actually a boarder in Mrs. *Kenrick's* house at the time when Lord *Huntingtower* went to *Scotland*; and that Mrs. *Kenrick* overcame her virtuous scruples; persuaded her to go to *Scotland* for the purpose of being married; and saw her safely on board the steamship *Clarence*, which conveyed her to *Granton*. Now, Mrs. *Steggall* states positively that the Petitioner was only known to her as Mrs. *Tollemache*, and that, on the very first occasion of their meeting, Lord *Huntingtower* introduced the Petitioner to her by that name, and at the same time explained that they had been married in the country only two or three days before he came up to *London*. No doubt the witness also stated that, at this distance of time, her memory does not retain all that occurred in the year 1844; and her answer to numerous questions put to her, with regard to the allegations of the Petitioner, was *non memini*. But I see no reason to doubt that the testimony of Mrs. *Kenrick*, so far as given affirmatively, is reliable; and whilst that testimony is, in all respects, consistent with the probabilities which the Petitioner's own evidence suggests, it appears to me to exclude the idea that the Petitioner was leading the virtuous life of a single woman, waiting for admission to the honourable state of marriage.

After some months thus spent in *London* and its vicinity, it seems to be an undoubted fact that Lord *Huntingtower* did go to *Scotland*, and take up his residence at *Grecian Cottage*, *Trinity*, near *Edinburgh*, and that the Petitioner followed him. Why they should have gone to *Scotland*, as the Petitioner says they did, for the purpose of getting married there, is a problem of which, in my

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opinion, no intelligible solution has either been given by the Petitioner, or suggested in argument. According to the Petitioner, Lord *Huntingtower* was always ready and willing to marry her in *England*, either *in facie ecclesiæ* or before a registrar; and if that statement be true, it is not easy to discern any sufficient cause for resorting to a marriage in *Scotland*. The reasons assigned by the Petitioner are not very consistent. At one time she says that her wretched state of health, occasioned by the brutal conduct of Lord *Huntingtower* at *Southstoke*, was the only obstacle to their union; but it is hardly credible that a woman, who was able to move about from place to place in *London* and its vicinity, and to pay visits in *West Devonshire*, should be incapable of going through the ceremony of marriage. At other times she says that the delay of their nuptials was owing to the dilatoriness of Lord *Huntingtower*, a reason which has at least the merit of greater probability than her own ill health. The suggestion, for it is no more, that Lord *Huntingtower* wished the marriage to be kept secret, or at least desired to avoid the interference of his family, appears to me to be equally unsatisfactory. His Lordship, at that time, was not only living in entire independence of family control, but, if there be any truth in the Petitioner's evidence, he informed his mother, Lady *Dysart*, that the marriage was about to take place; and, after it did take place, he at once made it known to his relatives and friends that the Petitioner had become his wedded wife. There is, so far as I can see, nothing in the evidence adduced for the Petitioner, to warrant the inference that Lord *Huntingtower* either intended to conceal their alleged marriage, or that he had any motive for its concealment. On the contrary, it is of the essence of the case which the Petitioner has stated, and has endeavoured to substantiate, that, after their return to *England*, Lord *Huntingtower* and she were habite and repute married persons.

On her arrival at *Granton*, in the steamer *Clarence*, the Petitioner was met by *Frederick Spicer*, his Lordship's valet, and by him escorted to *Grecian Cottage*. What is said to have taken place there, between her and Lord *Huntingtower*, is very minutely detailed in the Petitioner's own words; but these have been so recently read by my noble friend (Lord *Blackburn*) that I shall

not repeat them. The alleged ceremony was twice performed, first before *Frederick Spicer*, and then before *Spicer* and *Margaret Ritchie*, the only difference being that, on the second occasion, Lord *Huntingtower* read, in the hearing of the witnesses, a letter from his mother, Lady *Dysart*, calling him "a gull" for having taken his wife to *Scotland*, and intimating that he must in future call the Petitioner his wife, and that he "could never marry again." After these formal exchanges of matrimonial consent, the Petitioner says they lived together as married persons,—"We cohabited together as man and wife from the hour he made me his wife, by saying these words in the presence of his servants."

My Lords, if it be the fact that the ceremony thus narrated was actually performed, and that she did at the time rely upon it as constituting marriage, there can be no doubt that the Petitioner thereby became the wife, and is now the widow, of Lord *Huntingtower*, according to the law of *Scotland*. Whether Lord *Huntingtower* did or did not contemplate that result is immaterial. "For," to use again the words of Lord *Stowell* in *Dalrymple* v. *Dalrymple* (1), "surely it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted."

My Lords, *Frederick Spicer* is dead, and *Margaret Ritchie* is also dead, so that the Petitioner has had the opportunity of giving her own version of what occurred within *Grecian Cottage, Trinity*, in July, 1844. But the very graphic and circumstantial account which the Petitioner has given before this committee of the ceremony by which it is alleged that she and Lord *Huntingtower* expressed, before witnesses, their mutual and present consent to marry, when compared and contrasted with the accounts which the Petitioner herself afterwards gave of her marriage, has satisfied me that no such ceremony ever took place, and that the idea of a ceremony is an afterthought of very recent origin.

It is necessary to bear in mind that, according to the Petitioner's account, Lord *Huntingtower*, at the time when he com-

(1) 2 Hagg. C. R. at p. 107.

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municated to her his project of taking a house in *Scotland*, and getting married there, explained the Scotch marriage laws to her. She says, "He explained them to me in this way. He said if we went to *Scotland*, and made a vow before witnesses that we intended to become man and wife, that would be a legal marriage." The Petitioner must therefore have expected, when she went to *Scotland*, that she would there be made the wife of Lord *Huntingtower* by means of some such ceremony as that which she describes, and she emphatically states that, as soon as the ceremony before *Spicer* was over, she "was satisfied," adding, "I considered myself from that hour to be the wife of Lord *Huntingtower*, honourably so; and I am sure I never had any doubt upon it. I felt that it was right and proper, because he had told me so; and then I made inquiries privately, unknown to him, and I was told also that it was a legal marriage." Assuming it to be true that, in consequence of Lord *Huntingtower's* explanations, and as the result of her private inquiries, she did honestly believe that the ceremony at *Grecian Cottage* was effectual to constitute a Scotch marriage, and that she did, in reliance upon it, surrender her person to the man whom she had thereby taken for her husband, one can hardly conceive that the Petitioner should afterwards have claimed the position of wife upon any other ground. Yet, as I read the evidence, it is the fact that, after they left *Scotland*, on occasions when it would have been of the last consequence to establish her marriage with Lord *Huntingtower*, she did not think fit to divulge that ceremony before witnesses, but alleged a marriage by living with his Lordship in *Scotland*, and by subsequent repute or acknowledgment. And it appears to me to be also proved, by her own testimony, that she remained silent in regard to that ceremony during all the time that *Frederick Spicer* and *Margaret Ritchie*, the witnesses to its performance, were alive and accessible.

After their return to *England*, Lord *Huntingtower* seems to have continued in cohabitation with the Petitioner for upwards of three years, three daughters being the result of their connection during that period. The third of these children was born on the 14th of January, 1848, and, as I understand her statements, which are not very precise as to dates, shortly after that event, Lord

Huntingtower quitted the society of the Petitioner, leaving her and her offspring destitute. In her extremity, the Petitioner applied for assistance to Lady *Dysart*, who for some time made her an allowance of £5 per month. In a letter written by her to Lady *Dysart*, bearing date the 5th of February, 1849, the Petitioner, after acknowledging a letter from her Ladyship, containing a remittance of that amount, thus proceeds:—

> You say, Madam, in your letter that you should like to know what his Lordship's letters contains that is of importance to me—the all till that he as acknowledge me as his *wife* by living *togeather as* such *in Scotland*—from that time in the year 1844, he gave me his name, and introduces me as his wife two every one, he himself has had all three of the children *registered* in the name of *Tollemache*, and I always considered myself a married woman from that time.

Not one word about an antecedent ceremony before witnesses. On the contrary, the Petitioner rests her not very confident assertion of a marriage upon their cohabitation in *Scotland*, followed by acknowledgments of her marriage in *England*. It is suggested by the Petitioner that these statements were merely intended by her to set forth in general terms the fact that a marriage had taken place according to the law of *Scotland*. If so, it is a singular thing that the writer, who had made private inquiries regarding the law of *Scotland*, should have selected words expressive of a well-known mode of contracting marriage in that country; and it is equally singular that these words should have been addressed to a lady who, according to the Petitioner's own statement, knew that she was married to Lord *Huntingtower* before their "living together" in *Scotland* had well begun, and that there should be no allusion whatever to the ceremony, or to that important letter from Lady *Dysart* to her son, which is said to have been read on the occasion of the ceremony, in the presence and hearing of the two persons who witnessed it.

Lady *Dysart's* bounty ceased after a time, and the Petitioner and the children then became chargeable to *Lambeth Union*. A Mr. *Jarrett*, one of the relieving officers, took an interest in them, and made outlays for their maintenance to the extent of £190, which he sought to recover from Lord *Huntingtower*, on the footing that the Petitioner was his wife. The action, which was tried in 1853, failed, but it is clearly apparent that the information upon

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which the suit was brought was furnished by the Petitioner, who, in cross-examination, gives this account of it:

Did you hear, about that time, anything said about your having been married to Lord *Huntingtower* by habit and repute?—Yes.

You heard that?—Yes, every one acknowledged that.

About your having been held out as his wife to people in *Scotland*?—Yes.

That is what they wanted to prove, is it not?—Yes, I believe so, in order for *Jarrett* to get his money.

According to the Petitioner's statement, Mr. *Jarrett* and his solicitors were in communication with *Frederick Spicer* and *Margaret Ritchie*; but her own evidence makes it to my mind clear that they were referred to merely as persons capable of proving habite and repute in *Scotland*, and not as witnesses to the ceremony which she now alleges.

Some years afterwards, apparently about 1860, the Petitioner was in frequent communication with a gentleman of the name of *Welch*, a friend of Lord *Huntingtower's*, who used frequently to give her money from his Lordship. The Petitioner says she informed Mr. *Welch* that she, and not Miss *Burke*, was the lawful wife of Lord *Huntingtower*; and this is her own account of the information which she so gave:

Had you told Mr. *Welch* before this date that you had become Lord *Huntingtower's* wife by living in *Scotland* with him?—Yes.

Did you say to him that you had contracted a marriage by living with Lord *Huntingtower* for a fortnight in *Scotland*?—I never said a fortnight; it was more than that we were there.

A fortnight or three weeks?—I might have said that, but it was over that time.

Again, on the occasion of the trial at *Maidstone* in 1865, the Petitioner admits that, when examined as a witness, she did not say a word about the ceremony before *Spicer*; but her omitting to make mention of the ceremony at that time is not of much consequence, in my opinion, because the Petitioner was then suing as a single woman, and it does not appear that she then asserted any claim to the position of Lord *Huntingtower's* wife.

There is one more passage in the Petitioner's evidence bearing upon this matter of the ceremony, to which I must refer. At the time when she was deserted by Lord *Huntingtower*, and subsequently, for a considerable period, the Petitioner lodged with

Miss *Pottle* in *Kennington Lane*, and she stated that she told her landlady all about her marriage in *Scotland*. The Petitioner then states as follows:

Did you describe to her (Miss *Pottle*) the ceremony that was performed?—No, I did not tell her, that I know of.

Afterwards, did you tell Mr. *Jarrett* about this ceremony?—I think I did.

You know what I mean by the "ceremony," the declaration?—Yes, by which the arrangement was made for me to become his wife.

That is to say, the declaration before *Spicer* and *Margaret Ritchie*?—Yes, I think I did.

You told them all about that?—I told them all about that.

Is it not the fact, Madam, that you have said all along that you were married to Lord *Huntingtower* by having lived with him for a fortnight or three weeks in *Scotland*?—I never stated any time. I said "I lived with him to become his wife in *Scotland*."

Have you not stated several times to different people that the way in which you became his wife was by living with him for some time, or for a short time, in *Scotland*?—I dare say I have done so.

Did you ever say anything about this ceremony?—Yes.

To whom?—I told my friends so.

Will you give me some of their names?—I told my mother.

Anybody else?—I told my sister.

Your sister?—My married sister.

Anybody else?—I dare say a number of people. I dare say I might have done. Mrs. *Kenrick* was fully aware of it too. They received letters from Lord *Huntingtower*.

I cannot regard that as a straightforward truthful statement. The most favourable construction for the Petitioner which I can put upon it is, that the Petitioner having begun by first "thinking," and then boldly asserting that she told Mr. *Jarrett*, and some other person whom she does not name, all about the ceremony, then goes on to admit her having stated all along that she was married by living in *Scotland* with Lord *Huntingtower*, and that, so far as she can recollect, the only persons whom she told about the ceremony were her mother and her married sister, although she may also have spoken about it to some people whom she has forgotten.

My Lords, I cannot in these circumstances believe that the alleged ceremony of marriage at *Grecian Cottage, Trinity*, ever took place. When she and her children are starving in 1849, though anxious to satisfy Lady *Dysart* that she had become the lawful wife of Lord *Huntingtower*, she says nothing about it.

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When her friend and benefactor, Mr. *Jarrett*, is attempting, in 1853, to recover from Lord *Huntingtower* his advances made for her support, she says nothing about it, and though both *Spicer* and *Richie* were then alive, leaves Mr. *Jarrett* to allege and fail in proving a marriage by habit and repute. She seems to have reserved the ceremony as a foundation for claiming the honours of *Dysart* and *Huntingtower* on behalf of her children, and to have confided it, in the meanwhile, to no one except her mother, a married sister, and possibly to some other persons unknown.

There having been, according to the view which I take of the evidence, no ceremony of marriage in *Scotland*, the Petitioner's case entirely fails. But I think it right to advert to the mutual relations which subsisted between Lord *Huntingtower* and the Petitioner, subsequent to her arrival at *Granton* in 1844, which do not appear to me to be calculated to suggest that they were married persons.

It seems to be established that, from the time the Petitioner went to *Scotland*, Lord *Huntingtower* continued to live in her society, until he left her at Miss *Pottle's* lodgings in 1848. After that date they never lived together. The Petitioner understood that Lord *Huntingtower* went to *America*, shortly after he left her; and at all events she did not see him until after the celebration of his marriage with Miss *Burke*. In 1854, a deed of covenant was executed, under which an annuity of £60 was settled by Lord *Huntingtower* upon the Petitioner; and in 1857, a deed of agreement was entered into, by which his Lordship obtained the custody and undertook the education of their children. The Petitioner was a party of both these deeds, in the character of spinster, and under her maiden name of *Elizabeth Acford*. The Petitioner had various interviews with Lord *Huntingtower* before, and also at the time when the first of these deeds was executed; but from that time they never met until shortly before the date of the second deed, when the Petitioner states that he began to visit her occasionally, and have intercourse with her, and that he continued to do so until 1863, when their intercourse finally ceased. According to the Petitioner two children were the fruits of this intercourse, the one a boy, who was born and died in the year 1858, and the other her infant son *Albert Edwin*, born on the 15th of

February, 1863. It may be doubted whether, on the assumption that the Petitioner was married, the evidence is sufficient to establish that *Albert Edwin* owes his paternity to Lord *Huntingtower*; but that is a point which it has become unnecessary to decide.

The Petitioner alleges in her case that, after the ceremony at "*Grecian Cottage*," "the Petitioner and the said Lord *Huntingtower* cohabited together as husband and wife, and were habit and repute husband and wife." That allegation cannot apply except to the period of three years and upwards during which they did cohabit. It can have no application to the time when Lord *Huntingtower* is supposed to have been in *America*, or to the period following his marriage in 1851. Even when so limited, the allegation appears to me to have been made either upon an erroneous estimate of the evidence which the Petitioner was about to lead, or under a misapprehension of what constitutes habit and repute according to the law of *Scotland*. In justification of these remarks, I cannot do better than refer to the definition given by Lord *Westbury* in the *Breadalbane* marriage case, *Campbell* v. *Campbell* (1) of that which constitutes habit and repute in the marriage law of *Scotland*. His Lordship says, "It is the holding forth to the world by the manner of daily life, by conduct, demeanour, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relations, neighbours, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation."

I am unable to find aught in the conduct of the parties, subsequent to the alleged ceremony, which can satisfy the definition which I have just cited. Taking the Petitioner's own statement, there was nothing in the manner of their life to indicate to the world that their relations to each other had undergone any change. At hotels, and in the lodgings which they occupied, they were still known, as they had previously been, as Mr. and Mrs. *Talmash*; but, whilst Mr. *Talmash* was in the constant habit of visiting his relations and friends, in his proper character and under his proper title of Lord *Huntingtower*, Mrs.

(1) Law Rep. 1 H. L., Sc. at p. 211.

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Talmash never accompanied him on any of these occasions. According to her own evidence, the Petitioner had no personal acquaintance with the members of his Lordship's family, or with the friends and intimates of the *Dysart* family, and was never received or recognised by them as the wife of Lord *Huntingtower*. There is no reason to doubt that the Petitioner was present, as Mrs. *Talmash*, on the occasion of entertainments given by Lord *Huntingtower*, as Mr. *Talmash*, to some of his bachelor acquaintances, who were, probably, not very fastidious in the selection of their company, when the ladies of their own family were not present. But, during the whole course of this so-called habit and repute, the Petitioner was never introduced to a female relative of these persons; and, so far as I can find, she never paid visits to, or was visited by, a respectable female friend of Lord *Huntingtower*, unless it were Mrs. *Kenrick*, whose acquaintance with her as a married woman commenced, unfortunately, before they had been in *Scotland*.

The position and conduct of the Petitioner, during the long term of years which followed her desertion by Lord *Huntingtower* in 1848, so far from supporting, is subversive of the theory of a previous marriage. After 1848 there could be no habit and repute, because there was no matrimonial cohabitation, which is the only foundation upon which habit and repute can rest. And after the 26th of September, 1851, the *status* and repute of wife attached exclusively to the lady who upon that day was married, *in facie ecclesiæ*, to Lord *Huntingtower*. So far as the written evidence goes, it proves that, after her desertion in 1848, the Petitioner wrote to Lady *Dysart* as *Elizabeth Ackland*. She says, no doubt, that Lady *Dysart* refused to correspond with her if she took the name of *Tollemache* or *Huntingtower*, and requested that she should take the name of *Ackland*, as being nearest her maiden name of *Acford*; but that assertion is plainly contradicted by a contemporaneous writing under the Petitioner's hand. Then, after Lord *Huntingtower's* marriage to Miss *Burke*, the letters written to her by Lord *Huntingtower* are all addressed to her in her maiden name. And, what appears to me to be of much more importance, the Petitioner in the year 1854, as *Elizabeth Acford*, became a party to the execution of a formal deed of covenant,

which sets forth in express terms that she had illicit cohabitation with Lord *Huntingtower* for some time previous to the year 1849, and that such cohabitation had wholly ceased at or about the middle of the year 1848. The Petitioner held by that deed, and either received or recovered by legal process from Lord *Huntingtower* the annuity payable to her under it, until his Lordship's death in 1872, after which she preferred her claim against his estate. Again, the Petitioner, on the 14th of December, 1859, wrote to Lord *Huntingtower* in these terms: "*Huntingtower*, if you will give me £1000 I can get married in a month, and in case the man might do as you have done, leave me to the mercy of the world, I will thank you to have it all made over to myself, so that I may do with it as I think fit." This application was unsuccessful, and two months afterwards, upon the 12th of February, 1860, she wrote to Mr. *Welch*: "With reference to the subject that I were speaking with you upon, I beg to repeat that I can get married immiately (*sic.*), and will do so if Lord *Huntingtower* will give me £500." These two letters speak for themselves, and require no comment.

It is true, no doubt, that the Petitioner states that she subscribed the deed of 1854 under the pressure of poverty, and in the belief that it could not do away with her marriage; and she likewise explains that her letters to Lord *Huntingtower* and Mr. *Welch* about getting married immediately, were not seriously intended, but were written "in a playful manner." It would, in any case, require something more than the unaided testimony of the Petitioner to explain away the obvious meaning of writings such as these; and it appears to me to be impossible, in the present case, to receive the improbable explanations which she gives in order to make the facts tally with her own story. The Petitioner can hardly expect to be permitted to corroborate her own tale, by herself explaining away or contradicting all the evidence which conflicts with her testimony.

Thus far, the history of the relations between Lord *Huntingtower* and the Petitioner after the alleged ceremony at *Grecian Cottage* is decidedly unfavourable to the Petitioner; and it is right that I should now advert to certain parts of the evidence, which were, with great moderation and propriety, pressed upon

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your Lordships by the Petitioner's counsel, as supporting her credibility, and as tending to shew that a marriage did take place in *Scotland* between her and Lord *Huntingtower*. These depositions, strictly speaking, belong to the legal category of acknowledgments of marriage, rather than to that of habit and repute.

First of all comes the acknowledgment by Lord *Huntingtower* that the Petitioner was his wife, made to *Horne*, the policeman, at *Grecian Cottage*. The words which Lord *Huntingtower* is said to have used on that occasion are these:—"She knows very little of *Scotland* yet, we are here on our marriage tour." He did not say that they had come to *Scotland* to be married, or that they had just been married in the cottage where the conversation with *Horne* took place. On the contrary, the words used were plainly calculated to convey the impression that, having been married elsewhere, they had come to *Grecian Cottage* in the course of their marriage jaunt; and they are very like a repetition of the statement previously made by Lord *Huntingtower* to Mrs. *Kenrick*, to the effect that they had been married "down in the country" before they first came to *London*.

Then there are acknowledgments by Lord *Huntingtower* at hotels, and at a linendraper's shop in *Dover*, not that there had been a marriage in *Scotland*, but that Mrs. *Talmash*, by which name the Petitioner then went, was his wife. It is needless to say that such acknowledgments are valueless as evidence in a question like the present, and are *per se* not more conclusive of marriage than of concubinage. When a man takes his mistress with him to an hotel, or goes with her to a shop to buy baby linen, the probability is that he will prefer describing her as his wife to explaining her true position.

For reasons somewhat analogous, the statement made by Lord *Huntingtower* to General *Harrison* in 1847 does not appear to me to be of any importance, and if it were, the Petitioner is placed in this dilemma, that if she admits the truth of that statement and founds upon it, she must necessarily admit that her own statement on oath, as to the rape committed at *Southstoke*, is false.

By far the strongest fact proved in the Petitioner's favour, according to my view of the case, is the registration by Lord *Huntingtower*, in January, 1847, of the birth of their daughter

Elizabeth Frances, as the lawful child of *W. L. Talmash* and *Elizabeth Talmash*, formerly *Acford*. It does not rest on the testimony of the Petitioner; but it is only a single isolated incident in a long course of events with which it is not easily reconcilable; and it dwindles to the very smallest *scintilla*, when contrasted with the mass of evidence to which it is opposed.

I think it is proper, in this connection, to refer to the plea stated by Lord *Huntingtower* in the action brought by the Petitioner for a quarter's annuity due to her under the deed of 1854, which was tried at *Maidstone* Assizes in the year 1865, and which may be regarded as part of the *res gestæ*. The evidence discloses certain painful circumstances which readily suggest the motive which prompted Lord *Huntingtower*, at that time, to meet the action raised by the Petitioner, in the character of his discarded mistress, with the defence that she, and not *Katherine Burke*, Lady *Huntingtower*, was his lawful wife. How that scandalous proceeding can assist the Petitioner in her present contention, I fail to comprehend. She resisted the plea in defence, as a mere pretext for defeating her just claims under the deed of 1854; and eventually—Lord *Huntingtower* having withdrawn the allegation, which he ought never to have made—she obtained decree for the termly payment then due to her in respect of her illicit intercourse with Lord *Huntingtower*, which had terminated in the year 1848.

Another point fairly urged in behalf of the Petitioner was, that Lord *Huntingtower* forcibly took from her his letters which she had carefully preserved, as affording evidence that they had been married in *Scotland*. I do not doubt that, in an action for setting up that marriage, instituted before September, 1851, that fact, if proved, would have laid a heavy *onus* on Lord *Huntingtower*; and I am disposed to hold that, if satisfactorily proved now, it would entitle the Petitioner's testimony to a somewhat more favourable consideration at your Lordships' hands. But the alleged abstraction of these letters rests upon the single testimony of the Petitioner, and does not appear to me to be satisfactorily proved, or proved at all. The important letters were obviously and necessarily those which the Petitioner had received from Lord *Huntingtower* before his desertion of her in 1848, and her account

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is that, about the time of her confinement, on the 14th of January, 1848, he took from her the whole of the letters then in her possession, burnt some in her presence, and carried away the rest, which she never saw again; then on the very day he finally left her at Miss *Pottle's*, she says that Lord *Huntingtower* broke open her dressing case, and took away all the letters he had written to her after the 14th of January, 1848. I am unable to give the slightest credit to these statements, when I find the Petitioner, on the 5th of February, 1849, some months after their alleged abstraction and partial destruction, in a letter to Lady *Dysart*, expressing her willingness to give up these very letters, and giving a description of their contents; and, if the description so given was according to the truth, which I see no reason to doubt, they would not have aided, but would have contradicted the case which the Petitioner has now endeavoured to make, and it is to that fact, and not to any act of Lord *Huntingtower's*, that I feel constrained to attribute their non-production in these proceedings. Nor am I able to accept the Petitioner's statement that in 1854 she gave up to Mr. *Shephard* "dozens of letters," such as a "husband would write to his wife," because it is perfectly plain that they did not correspond on these terms, in the interval between her desertion in 1848 and the date of the deed of 1854.

It is also to be observed, in fairness to the Petitioner, that, from the time she was deserted by Lord *Huntingtower* in 1848 until she subscribed the deed of covenant of 1854, she did not cease to maintain that she was the lawful wife of Lord *Huntingtower*, although she did not take any judicial steps for the vindication of her rights. That is a circumstance favourable to the conclusion that she did at one time entertain the belief that she was married to Lord *Huntingtower*. But her belief during that period was founded upon the notion that living together for three weeks in *Scotland*, followed by cohabitation in *England*, and the kind of acknowledgments to which I have already referred, was sufficient to constitute a marriage, and, accordingly, she asserted her marriage upon these grounds alone. Had the Petitioner's testimony in the present case been to that effect only, whilst holding that she was under error as to the law of *Scotland*, I would, at least, have given her credit for having spoken the truth.

My Lords, such being my views of the evidence, I have come without difficulty to the conclusion, not that the Petitioner's proof has fallen short of what the law requires, leaving a suspicion that there may be some foundation for her story, but that it completely disproves the allegation of a marriage between her and the late Lord *Huntingtower*.

I have only to add that, in my opinion, the Petitioner, *William John Manners*, has fully established his right, as the only son and heir of line of the late Lord *Huntingtower*, to the vacant titles, honours, and dignities of Earl of *Dysart* and Lord *Huntingtower* in the peerage of *Scotland*.

LORD SELBORNE, L.C.:—

My Lords, it is a satisfaction to me to have heard the opinions of my noble and learned friends on the effect of the evidence in this case, which relieve me from the necessity of doing more than shortly to express my agreement with them.

If the statements of *Elizabeth Acford* as to the promises and declarations of Lord *Huntingtower* before the visit to *Scotland* were to be taken as true, I could myself draw no other inference from them than that Lord *Huntingtower* did not intend, in *Scotland* or elsewhere, to contract a legal or binding marriage with *Elizabeth Acford*. He was his own master, and was evidently quite independent of all moral or other control of his parents. There was nothing whatever to prevent him from marrying in *England*, either in church or in the registrar's office (as *Elizabeth Acford* says he talked of doing), except the fact that any such marriage would have been legal and binding. Having, according to the evidence, gone to *Scotland* on no other business, the shortest, easiest, and best known way of contracting a Scotch marriage from *England* at that time, would have been by going to *Gretna Green*; but there, also, a record of the marriage would, I believe, have been preserved, and there could have been no subsequent escape from it. The motive of avoiding such irreconcilable offence to his parents as a marriage of this kind might give, may have been a powerful reason why he should not contract it: and it is evident to me, from the letter to Lady *Dysart* of the 5th of February, 1849, to which both my noble and learned

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friends have adverted, that this motive did operate upon the mind, not of Lord *Huntingtower* alone, but of *Elizabeth Acford* also. But the statements to which *Elizabeth Acford* has pledged herself, are such as to make it impossible for her to allege secrecy as the reason for resorting to an irregular Scotch marriage rather than a marriage in *England*. For it is a part of her evidence that Lord *Huntingtower* told her he was furnished by his mother with the money necessary for this journey to *Scotland*; that he communicated to her its purpose, and the fact of the marriage, which is said to have been its result; and that he read to *Elizabeth Acford*, and before his servants, a letter from his mother referring to that marriage and to its effect, as making it impossible for him ever afterwards to marry anyone else.

I agree with my noble and learned friends who have addressed your Lordships, that if words importing a contract of marriage *de præsenti* had been interchanged, as alleged, with a serious purpose of marriage on the part of *Elizabeth Acford*, and with a secret purpose of deception on Lord *Huntingtower's* part, he could not have been permitted to set up his own fraud to nullify that contract. But, in order to arrive at the conclusion that there were any such mutual declarations with any such intention or understanding on either side, it is necessary that the statements of *Elizabeth Acford* should be believed. If I am led by what she states as to the previous words and conduct of Lord *Huntingtower*, to a clear conclusion that he did not intend to constitute a marriage by what took place in *Scotland*, I am equally led by the whole course of her own subsequent life and conduct to a not less clear conclusion that *Elizabeth Acford* also never really understood or believed that a marriage had been constituted by what then took place. Even if there were nothing else to discredit her testimony, I should myself think it right to rely upon the conclusions which I draw from her life and acts—from what she did and what she did not do—rather than upon the account which now, after the lapse of thirty-eight years, and after having been well instructed in the Scotch law of irregular marriage, she, and she alone, gives of the words said to have been spoken at *Grecian Cottage* in July, 1844. During the years which followed her first desertion by Lord *Huntingtower* in 1848, and his marriage to Miss

Burke in 1851, she was in very frequent communication, not only with other persons able and willing to befriend her, but with several solicitors: more than one action was brought, in which proof of the facts now alleged by her would have been extremely important, and could not have been difficult if those facts had really occurred. The persons in whose presence she alleges the Scotch marriage to have been contracted and acknowledged, and others who could have corroborated that story, if true, were not only then living, but were in actual communication with the solicitors of those who took up her cause, and who were interested in the proof of her marriage. All the evidence which those persons could give was then known; and, nevertheless, *Jarrett's* action failed; and no attempt was made to claim for her the *status* and rights of a wife by any proceeding in the matrimonial Court of this country. She contracted, as a single woman, with Lord *Huntingtower* through the agency of solicitors who must have known all the facts; she wrote letters in which she professed to contemplate the use of her freedom to contract marriage with any other person, if Lord *Huntingtower* would agree to certain pecuniary conditions.

Your Lordships have sufficiently adverted to the strong evidence afforded by the letter to Lady *Dysart* of the 5th of February, 1849, and to other proofs, that whenever she thought it expedient to talk about a Scotch marriage, either to extract pecuniary help from Lord *Huntingtower's* family, or for any other reason, she used language pointing to mere cohabitation as husband and wife in *Scotland* (or, speaking technically, to "habit and repute") and not to any contract *per verba de præsenti;* and I hold it to be impossible that she could have done so, if the words, now alleged to have been spoken, had been actually spoken, with the intention, belief and understanding on her part that she and Lord *Huntingtower* then and thereby actually, and antecedently to any matrimonial cohabitation, became husband and wife.

I cannot but add that her positive statement that Lady *Dysart* in 1848 suggested to her the assumption of the name of *Ackland* instead of *Acford* is clearly disproved by a letter to Lady *Dysart* under her own hand, which she attempted to repudiate, though the identity of the handwriting with that of her other letters is

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unquestionable. This incident may not, in itself, be of much importance; but the untruth can hardly have been without a motive; and it would have been strange if Lady *Dysart* had really suggested the use of another name, instead of *Aeford*, believing her to be unmarried.

A still more important contradiction to the whole story which she tells as to the original circumstances of her connection with Lord *Huntingtower* appears to me to be contained in the same letter to Lady *Dysart* (of the 5th of February, 1849), which has been so often referred to. She there says:—"He has often said, if I did not feel quite safe, he would take me to an English church and make me his wife openly, as he could not be happy without me; but that he should be discarded by his family, but that he did not mind. But, out of feelings to his noble family and birth, I did not wish him to do so; as I have often told him, if he had married a lady in his own sphere, it would have been a comfort to himself and friends; but this I could not persuade him, *both before and since the fatal occurrence* that took place between us." To these words, "the fatal occurrence," only one meaning can be attached. She therefore here represents that before as well as after Lord *Huntingtower* had prevailed over her virtue, she endeavoured to persuade him to make a marriage suitable to his rank—a representation which I cannot very easily reconcile with her present evidence as to what took place at *Southstoke*. But this is not all; the letter proceeds thus:—"If I had studied my own interest and future respectability more than I did in that case, I should now have been a happy woman. I could not bear the thought of one so noble as himself to share the fate with one so humble, if his family should discard him." I forbear saying more as to this passage, than that I think it could not possibly have been written by any woman who had not been (by some means) prevailed upon to *consent to* an intercourse which she knew to be illicit; that it seems to me absolutely irreconcilable with the story now told of brutal violence and ineffectual resistance in the first place, and absolute non-intercourse from that time forward, till the connection had become lawful by a ceremony understood and intended to have, and legally having, the effect of marriage in *Scotland*.

The case, therefore, of the opponent having failed, it only remains that I should move your Lordships, as I now do, to resolve that the Petitioner *William John Manners* has made out and established his right to the dignities of Earl of *Dysart* and Lord *Huntingtower*, in the peerage of *Scotland*, as claimed by his petition.

The same was agreed to.

The said resolution was subsequently reported to the House, and it was *agreed to*, and *resolved* and *adjudged* accordingly; and resolution and judgment to be laid before Her Majesty by the Lords, &c.

Lords' Journals, March 7 and 8, 1881.

Agent for Petitioner, *Elizabeth*, styling herself Dowager Lady *Huntingtower: Hermann H. Myer.*

Agents for Petitioner, *William John Manners*, Earl of *Dysart: J. A. Bertram & Edward Walmsley.*

[HOUSE OF LORDS.]

H L. (Sc.) HISLOP . . . . . APPELLANT;
1881 LECKIE AND OTHERS . . . . . RESPONDENTS.
June 23.

Feu Charter—Similar restrictive Conditions appearing in Feu Charters from Common Superior—What necessary to give each Feuar a Title to enforce them.

7 App Cas 446. 8 App Cas 271

It is settled by a series of decisions in the law of *Scotland* that where it appears that the restrictions in a feu contract are entered into for the benefit of other feus, either already existing, or to be created by the superior thereafter, the restrictions may be enforced by each co-feuar as far as his interest is concerned. But the fact of several feuars of neighbouring plots of building land in the same street holding from a common superior does not, by itself, entitle one of those feuars to claim the benefit of restrictions contained in the feu contract of another, unless some mutuality and community of rights and obligations is otherwise established between them, which can only be done by express stipulations in their respective contracts with the superior, or by reasonable implication from reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves.

A.'s author was a party to a feu contract of a piece of land upon which a house was already built, and he was taken bound not to build any other buildings on the said piece of land except offices. The adjoining pieces of land were feued off, some being taken not to build and others having that right. It was not indicated in *A.'s* feu that the restrictions were imposed for the benefit of the co-feuars, beyond the facts that the feus were all given out nearly at the same time; that some of the conditions inserted in the feus are similar to each other; and that the houses being built in a square, produce a considerable degree of uniformity.

B. and *C.*, proprietors of a neighbouring feu, sought to prevent *A.* building a carriage show room on the ground intervening between his house and the street of the square, and raised an interdict with the "consent and concurrence" of the superior; there was no condescendence or pleas in law for the superior:—

Held, reversing the decision of the Court below, (1) that the restrictive conditions as to building in *A.'s* feu contract was not in any sense *jus quæsitum tertio*; and (2), that the superior was not a party complainant in the action for his own separate interest; and therefore *B.* and *C.* being strangers to *A.'s* contract, *A.* ought to have been assoilzied from the action.

Suing with another Person's Consent and Concurrence—Strangers to the Action.

Persons who have no title in their own persons to raise and insist in an action, cannot have the right to sue, where nil, validated by the consent

and concurrence of the party to whom alone such right or title of action belong.

B. and *C.*, owners of an adjoining feu, raised an action with "consent and concurrence" of the common superior to enforce building restrictions contained in *A.*'s feu contract:—

Held, that *B.* and *C.* were strangers to the action, and therefore had no title to sue.

Practice—Amendment of the Record—31 & 32 *Vict. c.* 100, *s.* 29.

See remarks of Lord *Watson* as to the question of the importation of new parties into the suit under the *Court of Session Act*, 1865 (31 & 32 Vict. c. 100).

APPEAL against a judgment of the Second Division of the Court of Session, *Scotland*.

John Hislop, the Appellant, is proprietor under a notarial instrument recorded 15th of May, 1876, of a small piece of ground in *Gayfield Square, Edinburgh*, on which there is a dwelling-house. This house, which is No. 2 of the *Square*, stands back from the street some twenty-five feet, and has a frontage of fifty feet. At the back of the house is another piece of ground. In 1878 the Appellant commenced to erect a building on the ground intervening between the street and his house; and to excavate the garden ground at the back. The Respondents, Mrs. *MacRitchie* or *Leckie* and others, are the trustees of the late *Thomas Elder MacRitchie*, and as such are proprietors of No. 4, *Gayfield Square*, which is separated from No. 2 by a property which is No. 3. They, considering that the Appellant's building operations were injurious to their interests, and in contravention of the Appellant's titles, raised a note of suspension and interdict "with the consent and concurrence of the Governors of *Cauvin's Hospital*, incorporated by an Act of Parliament in the 7th and 8th years of the reign of his late Majesty *George* IV., c. 11, intituled an Act to explain and modify the trust settlement of the late *Louis Cauvin* for the endowment and maintenance of an hospital for the support and education of boys, Complainers" to restrain the Appellant from building upon any part of the ground in front of the dwelling-house No. 2, *Gayfield Square*, and also from erecting upon the garden behind a carriage or other manufactory, or any structure other than "offices" not exceeding twelve feet in length in the side walls; and furthermore, to remove any buildings or erections

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which may have been already made by him on the said front plot and garden behind, in contravention of his titles.

Cauvin's Hospital is now the superior of both the parties. The hospital's predecessor in title was *James Jollie*, who was absolute proprietor of the ground now occupied by Nos. 1, 2, 3, 4, and 5, *Gayfield Square*. Before 1782 this ground was unfeued, but by feu contract, dated the 6th of June of that year, *Jollie* feued to *Andrew Dick*, the Appellant's author, the piece of ground now divided into No. 2 and No. 3. The material parts of that feu contract were as follows:

James Jollie hereby sells, dispones and in feu farm demits to the said *Andrew Dick* and his heirs and assignees whatsoever, heritably and irredeemably: all and haill that area or piece of ground belonging to the said *James Jollie*, being part of the lands of *Broughton*, consisting of two roods or thereby, as the same has been lately inclosed by the said *Andrew Dick*, and upon which he has built a tenement of stone and lime, containing two separate houses, conform to a plan of elevation which was approved by the said *James Jollie*; which ground is bounded as follows, viz., by a stone dyke to be built by the said *Andrew Dick*, and by the ground lately feued by the said *James Jollie* to *James Besillie* and *James Moffat*, masons in *Edinburgh*, and the ground still belonging to the said *James Jollie* himself, upon the south-east. By another stone dyke lately built, and a road of four feet wide leading from the said *James Jollie's* property upon the south-east to his property upon the north-east of the ground hereby feued, and to a well digged therein, upon the south-west. By the stone dyke also lately built, and the said *James Jollie's* remaining property upon the north-west; and by the street or avenue belonging to the said *James Jollie* upon the north-east . . . . but declaring always that the said *Andrew Dick* and his foresaids shall be subject to the limitations and provisions contained in a charter of date of 24th of September, 1750, granted by the Governor of *George Heriot's Hospital* to the deceased *George Spankie* and *Walter Jollie*, both tailors in *Edinburgh*, the said *James Jollie's* authors and predecessors in the piece of ground hereby feued, and in the said *George Spankie* and *Walter Jollie's* infeftment following thereon of same date, and registered in the Particular Register of Sasins the 15th of November thereafter, in so far as such limitations or provisions may be found to be still effectual . . . . And further, the said *Andrew Dick* binds and obliges him and his foresaids not to erect any other buildings upon the said piece of ground, except the tenement of houses and walls of inclosure already erected thereon; and if he or they shall build any offices upon the back ground, which they are at liberty to do, the same shall not exceed twelve feet in height in the side walls: And the said *Andrew Dick* binds and obliges himself and his foresaids to be at a proportional expense in making the street upon the north-east boundary of the ground hereby feued, and of the foot walk upon the side thereof in so far as the said street and foot walk extend along his feu, and of upholding the same in all time coming thereafter, the said street to be thirty-two feet wide, and the foot walk to be four feet

wide, to be faced up with stone and lime: And whereas the said *Andrew Dick* has enclosed the said piece of ground upon the north-west, and is to enclose the same also upon the south-west, which walls of inclosure are to be mutual, it is hereby agreed that one-half of the expense of building the said mutual walls shall be paid by the neighbouring feuars, as the same shall be determined by two neutral men to be chosen by him and the said feuars, and the said *James Jollie* becomes bound that the said feuars shall fulfil this part of the agreement . . . .

The feu contract further declared that the declarations and restrictions above-mentioned were to be specially engrossed in all future renovations of the feu; declaring always that such infeftments as do not contain the same shall *ipso facto* become void and null. And these restrictions were duly inserted in the notarial instrument under which *Hislop* was infeft in 1876.

And this declaration was also in all the other feu contracts.

Under date the 14th of June, 1783, *Jollie* feued to *James Besillie* and *James Moffat*, the ground now forming No. 1 and shop and warehouse, No. 1, *Gayfield Square*, and shops at the corner of *Antigua Street*. It contained this clause:

Secundo, That the houses to be erected upon the remaining part of the ground hereby feued, lying behind the said 200 feet from the front, shall be built so as to face the said street or avenue which leads to Lady *Charlotte Erskine's*, and shall be placed at the same distance therefrom as the houses built by the said *Andrew Dick*, and shall not exceed two stories in height; and the said *James Besillie* and *James Moffat*, and their foresaids, shall not erect any other houses or buildings upon the said ground except the walls of enclosure, which are not to exceed seven feet in height.

The ground next feued out was the Respondents' property, No. 4, *Gayfield Square*, which was conveyed by *Jollie* to *William Fitzsimmons* by feu contract, dated the 13th of February, 1784; and it contained the following material provision:

And it is hereby declared that the said *William Fitzsimmons* and his foresaids shall have full power and liberty to erect another tenement of houses upon the ground hereby feued, to front the said intended street upon the south-west, to be placed in a line with the houses hereafter to be erected by the said *James Jollie* upon his property lying on the south-east of the ground feued by him to *Andrew Dick*, and to be of the same height with these houses so to be erected by him; and the said *William Fitzsimmons* binds and obliges him and his foresaids not to erect any other buildings upon the piece of ground hereby feued besides those above specified, except the walls of enclosure and the necessary offices, neither of which are to exceed nine feet in height.

The remaining property, No. 5, *Gayfield Square*, was originally feued in two lots, one of which (described as an "area or piece of

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ground") was feued by *Jollie* to *William Fitzsimmons*, and was by him disponed to Mr. *Ferrier*; and the other (described as "a strip of ground") was feued to Mr. *Ferrier*. The charter of resignation granted to the latter, and containing both subjects, is dated the 3rd of August, 1786. The important part is as follows:

> With power to the said *Hay Ferrier* and his foresaids to erect a tenement of stone and lime upon the area and strip of ground hereby disponed, of the same height and in a line with the tenement built by the said *William Fitzsimmons* upon his other feu, and possessed by the said Lady *Ann Paterson*, and also to erect another tenement of houses upon the area and strip of ground hereby disponed, to front the said intended street upon the south-west, to be placed in a line with the houses hereafter to be erected by me upon my property lying on the south-east of the ground feued by me to *Andrew Dick*, mason in *Broughton*, and to be of the same height with these houses so to be erected by me . . . . Declaring also that the said *Hay Ferrier* and his foresaids are hereby limited and restricted from erecting any buildings upon the area or strip of ground hereby disponed besides these above specified except the walls of enclosure and the necessary offices, neither of which are to exceed nine feet in height, and which offices are not to front the intended street upon the north-west.

The Respondents (Complainers) averred (reas. 7) each of the houses, Nos. 1, 2, 3, 4, and 5, has a plot of ground in front enclosed with walls and railings, and until lately no attempt has been made to make any alterations on them. They have plots of ground behind, the western boundary of Nos. 2 and 3 being a narrow lane, three or four feet wide, leading from *Union Street* to *East Broughton Place*, with buildings on the opposite side of it. The western boundary of the ground behind the Complainers' house and that belonging to No. 5, is *East Broughton Place*, and there are two building stances at the west end of the ground behind Nos. 4 and 5 facing, and with entry from, *East Broughton Place*, on which the proprietors are by their titles specially authorized to build. The proprietor of No. 5 has exercised his right, but the Complainers have not yet done so. No such power of building is conferred upon the proprietors of Nos. 1, 2, and 3, but they are specially prohibited by their titles from doing so, as such building would interfere with the houses in *Union Street* and on the opposite side of the lane.

The Appellant averred (stat. 4). The houses in *Gayfield Square* are not built in a uniform style, nor are they of the same height or dimensions of class, and they are not held of the same superiors.

The Appellant's property is on the west side of the square, which contains the properties Nos. 1, 2, 3, 4, and 5. These extend over nearly one-half of that side of the square. The houses on these properties are self contained, with plots of ground in front, separated by high walls; and facing the square the front walls, railings, gates, and doors are not similar or uniform. The buildings are of different heights and styles and dimensions. Between No. 1 and *Leith Walk*, occupying the other half of the same side of the square, there are shops and warehouses entering from the square. The ground behind No. 5 has been already built upon by the congregation of *Broughton Place* United Presbyterian Church, who have erected thereon a building of three stories. This was done with consent of the present Complainers or their author, and of the governors of *Cauvin's Hospital* as superior. Further, the Complainers' author built upon his back green erections which are in contravention of the alleged restrictions. Upon the ground behind No. 1, *Gayfield Square*, adjoining the Appellant's property, the said *James Jollie* built tenements of several stories in height.

The Appellant's pleas in law were :—

(3.) The Complainers not having any title to interfere with the Respondent's (Appellant's) operations, the note ought to be refused.

(4.) The Complainers having no interest to enforce any restrictions or prohibitions against the Respondents' operations, the note ought to be refused.

(6.) The Complainers' predecessor having himself contravened the alleged restrictions against building, and, *separatim*, having acquiesced in contravention of the same by the neighbouring proprietors, the Complainers are barred from now insisting upon the enforcement of the alleged restrictions or conditions against the Respondent.

The Lord Ordinary (1) granted an interlocutor interdicting the Appellant from building upon any part of the ground in front of his dwelling-house, No. 2, *Gayfield Square ;* and also from erecting upon the ground behind a carriage manufactory or any structure other than offices not exceeding twelve feet in height in the side walls, and further ordered him to remove any building or erection

(1) Lord *Rutherfurd Clark.*

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which he had already made on the front plot or garden behind, in contravention of his title.

The Appellant reclaimed against this decision to the Second Division of the Court of Session, but their Lordships adhered (Lord *Young* dissenting) to the Lord Ordinary's interlocutor, 17 Dec. 1879 (1).

On appeal,

May 12, 13, 16. *The Dean of Faculty* (Mr. *Kinnear*, Q.C.), and Mr. *Davey*, Q.C., contended for the Appellant, that in order to entitle one feuar to enforce restrictions against a co-feuar, he must shew that each feuar contracted with the superior with reference to the restrictions in the feu contract of the other feuars as to assuring a uniform plan or some other common benefit. But the restrictions in the Appellant's feu was a simple negative clause that he was not to build any other buildings; and there was no covenant as to the use of the houses already built. And examining the conditions in the various feu contracts, it was found that they were substantially different in words, and widely different in their effect, this being so, it was impossible to find mutuality of obligation among the feuars. The case of *McGibbon* v. *Rankin* (2) had no application, for there, the superior inserted in the earlier feu a restriction against erecting any buildings beyond a certain height, and bound himself to insert a similar prohibition in all future feus of ground in the same street, and having done so, it was held that a servitude had been imposed in the earlier feu, which the proprietor of the later feu had a title and interest to enforce. And in all the cases on this question there had been the basis of mutual amenity of title and obligation. They submitted therefore that there was nothing in the Appellant's titles to create a *jus quæsitum* in favour of the Respondents.

As to suing with the consent and concurrence of another, that form of pleading is only used for the purpose of removing disability, or excluding a possible objection to the Pursuer's title by the person concurring: but in all such cases the person under disability, or open to objection, sues on his own right and title.

(1) Court Sess. Cas. 4th Series, vol. vii. p. 384; 17 Scot. Law Rep. 254.

(2) Court Sess. Cas. 3rd Series, vol. ix. p. 423.

Here the superior was not a party to the suit, he was not mentioned as a complainer in the record, nor was there any statement of reasons of suspension for him, and the mere fact that the superior's name appeared on the note did not make him a party. If he was not a complainer, the Respondent could take no benefit from his consent and concurrence, there being no instance of a right of action being conferred upon a person who has none, simply by concurrence of the person who has the right. To do this the superiority from which the title arises must be conveyed.

Again, the right of the superior to enforce the restrictions (if he was a party here), would be as superior of the Appellant's particular property; on the other hand, the Respondents' right and interest is that of another feu, so that, for the purposes of this action, the superior and vassal were distinct and independent parties. Each of these titles must be good and complete in itself, or altogether worthless, and the concurrence of one party could not add anything to the title of the other.

Assuming the superior to be a party. In the Lord Ordinary's opinion they had here feu contracts containing similar conditions with the Appellants' which had been grossly violated. The superior therefore was barred from objecting to the Appellant's operations by having acquiesced in the previous contraventions of the conditions of the feus: for where a common plan, and departure from it, others can take advantage of it, see *Duke of Bedford* v. *British Museum* (1); *Clydesdale Bank* v. *Campbell* (2).

As to the *Court of Session Act*, 1868, if a case proceeded to trial with a person as Complainer, who had no right, it was absurd to say that Act allowed it to be amended by adding to the record as a party the name of the person who alone had the right.

The Solicitor-General for Scotland (Mr. *J. B. Balfour*, Q.C.), and Mr. *Wallace* maintained for the Respondents that the various feu charters contained similar, though not identical restrictions, imposed for their joint behoof, and that was sufficient to let in the principle of community of obligation capable of being enforced by one feuer against another. It was not absolutely necessary

(1) 2 My. & Keen's Rep. 552.
(2) Court Sess. Cas. 3rd Series, vol. vi. p. 943.

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that there should be a reference to a plan, nor any obligation undertaken by the superior to insert similar clauses into other grants.

It was enough if the superior inserted similar obligations in the later feu contracts, to shew that it was an instance of the feu that subsequent feuars had a *jus quæsitum* and a right of action to enforce the restrictions. See Lord President *Hope* in *Governors of Heriot's Hospital* v. *Cockburn* (1), "If a superior of a piece of ground feu it out for houses, stipulating in the first charter that the houses shall only be of a certain height, he thereby unquestionably acquires a servitude, which servitude is for the benefit of the rest of the ground remaining unfeued, when, therefore, the superior grants a second charter with a similar restriction, there is in like manner created a servitude over that part, and in favour of the tenement already erected; so that in this way there is created in progress of feuing a mutual right of servitude in favour of all the different feuars which each is entitled to enforce, even although there should be no express servitude granted in their respective charters over the houses of their neighbours." See also *McGibbin* v. *Rankin* (2), and *Alexander* v. *Stobo* (3): though these were stronger cases, as they contained a stipulation by the superior to put the other feuars under a similar restriction. But *Robertson* v. *North British Railway Company* (4), went further. There Lord President *Inglis* said, "when a superior feus out his land for building purposes, and lays all his feuars under the same obligations, there arises a mutuality of obligation among the feuars which depends upon the community of their relation to the superior. If all are bound to the superior, then the general rule undoubtedly is, that they have rights *inter se* whereby they are enabled to enforce the common obligation against one another." In that case a proprietor of a piece of ground granted a feu contract with a prohibition against his vassals using any portion of the ground for depositing manure. The disponees without taking infeftment, granted dispositions of the land in two lots. The pur-

(1) 2 W. & S. App. 293, at p. 302.

(2) Court Sess. Cas. 3rd Series, vol. ix. at p. 423.

(3) Court Sess. Cas. 3rd Series, vol. ix. at pp. 605, 609.

(4) Ibid. 4th Series, vol. i. p. 1213, at p. 1221.

chaser of Lot 1 completed his title by infeftment without reference to the restriction. The purchaser of Lot 2 included the restriction in his infeftment, which was duly recorded. Held that a singular successor in Lot 1 had a title and interest to interdict a singular successor in Lot 2 from contravening the restriction. In *Beattie* v. *Ure* (1) different lots of ground were given off under common rights, and held that a co-feuar who was in right of a condition that any erections made on the adjoining ground should be of stone and lime, was entitled to insist on the removal of a brick stable. In *Dalrymple* v. *Herdman* (2) Lord *Mure* said the result of the cases is "that where a number of feuars are put under the same restrictions by their common superior, each is entitled to enforce the restrictions against the others, and to protect himself from any violation of it." And here the Lord Ordinary said, the feu contracts contain similar though not identical conditions as to building. These condition seems to be inserted for the joint behoof of the feuars, and therefore enforceable by any against the others. See also *Stewart* v. *Bunten* (3). Here the Appellant's feu speaks of houses already built and of feuars with whom the Appellant's predecessor was to be brought into express relation; therefore an indication of future feuing, from which—coupled with what followed—they were entitled to draw that there was here a plain indication of a common plan, and a sufficient implication that the restrictions in the earlier feu were intended to benefit the adjoining ground.

But any want of title on the part of the vassal was supplied by the presence of the superior. The superior in giving his consent and concurrence to the application for interdict did not assign his right of action, but was here as communicating to his vassal any title the vassal may want.

The Respondents represented the *dominium utile* of their own estate, and the superior the *dominium directum* of the whole ground originally held by *Jollie*, not as a divided estate, but as representing an undivided superiority. Similar modes of suing are frequently adopted by landlord and tenant, truster and trustee,

(1) Court Sess. Cas. 4th Series, vol. iii. p. 634.

(2) Court Sess. Cas. 4th Series, vol. v. at p. 854.

(3) Court Sess. Cas. 4th Series, vol. v. p. 1108.

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creditor in possession and fiar. In many of which cases a defect in the title of the holder of the derivative right can be supplied by the concurrence of the holder of the radical right. On the question of interest also the presence of the superior as a consenting and concurring party could not be left out of view. See *Magistrates of Edinburgh* v. *Macfarlane* (1).

Also a concurrer is a leading party with the Pursuer, and necessarily brought in all his titles and right, and an adverse judgment would be *res judicata* against him; and he could be condemned in expenses: *Alexander* v. *Philips* (2).

On the remaining question they argued that the right to interfere had not been lost by contravention on the part of the Respondents themselves; or by their acquiescence and that of the superior, in contraventions on the part of other feuars.

Mr. *Davy* in reply:—

The Respondents *Leckie* and others were alone spoken of as Complainers on the record. Either the feuars have a right to enforce these restrictions, or they have not, if the latter, the consent and concurrence of the superiors do them no good, for it alone could not give them a right which they have not of their own. To give a third person a *jus quæsitum*, you must find from the original contract that it intended to benefit him: *Peddie* v. *Brown* (3).

As to making the superiors parties, the record could not be amended so as to substitute another person for one that is a party to the record.

It is difficult to understand how an adverse judgment would be *res judicata* against the superiors, as the only titles relied on here are those of the Complainers, and those titles are not the superior's titles. In *Robertson* v. *North British Railway Company* (4), the point here was not decided; and the dictum of Lord President *Hope* in *Governors of Heriot's Hospital* v. *Cockburn* (5) is not consistent with *Dalrymple* and *Stewart* and other cases, nor was it approved of in those cases.

(1) Court Sess. Cas. 2nd Series, vol. xx. p. 156.
(2) Court Sess. Cas. 2nd Series, vol. xviii. p. 617.
(3) 3 Macq. at p. 83.
(4) Court Sess. Cas. 4th Series, vol. i. p. 1213.
(5) 2 W. & S. App. 293.

The Law Lords delivered judgment as follows:—

LORD SELBORNE, L.C.:—

My Lords, the effect of the interlocutors appealed from in this case is to enforce against the Appellant at the suit of the Respondents certain restrictions on building contained in a feu contract dated the 6th of June, 1782, between one *James Jollie* and *Andrew Dick*, the Appellant's predecessor in title; *Jollie* being the superior, and *Dick* the vassal, under the contract.

These interlocutors are right, if the Respondents, who are neighbouring feuars under the same superior, were and are, by the combined effect of their own and the Appellant's titles, interested in the obligations and restraints imposed upon the Appellant by *Dick's* feu contract, so as to be entitled to enforce those obligations and restraints for their own interest; or (however, this may be), if the superior is, or ought to be deemed, a party complainant in the action, in such a sense as to be suing for his own separate interest. If neither of these propositions can be established, the Appellant ought to have been assoilzied from the action, and the present appeal ought to be allowed.

James Jollie was, in 1782, absolute owner of the whole ground, in the city of *Edinburgh*, which is now bounded by *Gayfield Square* to the north-east, *East Broughton Place* and *Union Street* to the south-west, and on the other two sides by *Antigua Street* and *Gayfield Street*. He divided it into four plots or parcels, one of which, consisting of two roods or thereabouts, was feued by him to *Andrew Dick* on the 6th of June, 1782. This feu contract recites that *Dick* had then lately enclosed that parcel of land and had built upon it two separate houses, conform to a plan of elevation approved by *Jollie*. The feu is described as, in one part bounded by ground lately feued by *James Jollie* to persons named *Besillie* and *Moffat*, and in all other parts by *Jollie's* remaining property, and by the street (then belonging to *Jollie*), upon the north-east. This feu contract contained the restrictions on building which the Respondents seek to enforce; and it also contained an agreement concerning certain walls of enclosure which *Dick* had built, or was to build, for the purpose of dividing his land from the parcels adjoining it, to the effect that such

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walls of enclosure were to "be mutual" and "that one half of the expense of building the said mutual walls should be paid by the neighbouring feuars," *Jollie* thereby becoming bound "that the said feuars should fulfil *that part of* the agreement." There is no provision in this contract, that either *Besillie* and *Moffat* (the persons spoken of as already feuars of part of the adjoining land), or any future feuars of any other part, should have the benefit of, or be in any way interested in, the restrictions as to building, or should be bound in favour of *Dick* and his successors in title by any similar restrictions. No general scheme or plan of building upon or otherwise using the adjoining parcels of land, or any of them, is indicated or referred to. The express provision already mentioned as to enclosure walls, is adverse to any implication of an intention that in other respects, mutual burdens, for each other's benefit, should be imposed upon *Dick* and the adjoining feuars.

The land so feued to *Dick* is now divided between two proprietors. The house, No. 2, *Gayfield Square*, with the ground belonging to it, which is vested in the Appellant, constitutes one half of that feu. No. 3, *Gayfield Square* (now vested in another proprietor), and the ground belonging to it, constitutes the other half, and intervenes between No. 2 and the Respondents' feu No. 4.

No. 1 on the other (or east) side of No. 2 was feued to *Besillie* and *Moffat* by contract dated the 14th of June, 1783, in implement (doubtless) of some earlier agreement. It contained provisions and restrictions as to building, to the effect that a house or houses, the erection of which was contemplated with a frontage towards *Gayfield Square*, should be set back from the street, as *Dick's* houses were, and should not exceed two stories in height. As to the rest of the land in this feu, the stipulations were different from those in *Dick's* feu contract and there was nothing in it, expressly or by implication, communicating to those feuars the benefit of any of the obligations entered into by *Dick* (except as to the enclosure walls) or making any obligation entered into by those feuars (with the same exception) a *jus quæsitum* for *Dick's* benefit.

The next feu granted was of No. 4, *Gayfield Square*, and the land belonging to it to the Respondents' predecessor in title (one

Fitzsimmons) on the 13th of February, 1784. The house fronting *Gayfield Square* in line with Nos. 1, 2, and 3, appears to have been then already built upon it, and so far from placing *Fitzsimmons* under restrictions corresponding with those placed on *Dick*, he was expressly authorized to build other houses on the south-east part of it, so as to range in point of height with some which *Jollie* the superior then contemplated building towards the street now called *East Broughton Place*. There is no reference in this feu contract to the restrictions on building to which *Dick's* feu was subject, still less anything purporting to communicate to *Fitzsimmons* any benefit from those restrictions.

The fourth and last plot of ground was afterwards feued, as to part, to *Fitzsimmons* (who conveyed it to *Ferrier*) and as to the rest to *Ferrier*; with provisions as to building similar in substance to those in the feu contract of No. 4 to *Fitzsimmons*.

No general scheme or plan of building was embodied or referred to in any of these feu contracts; and (except that the houses Nos. 1, 2, 3, 4, and 5, have a uniform frontage, so far as relates to their distance from the street, towards *Gayfield Square*) no such general plan appears to have been followed in building upon any of the plots of ground feued.

Under these circumstances, it appears to me to be clear that this case does not come within the principle of *McGibbon* v. *Rankin* (1) and the other authorities of that class. The restrictive provision as to building in *Dick's* feu contract was not, in any sense, *jus quæsitum tertio*; it was merely a condition of tenure between superior and vassal. The fact of several feuars of neighbouring plots of building land in the same street holding from a common superior does not, by itself, entitle one of those feuars to claim the benefit of restrictions contained in the feu contract of another, unless some mutuality and community of rights and obligations is otherwise established between them; which can only be done by express stipulation in their respective contracts with the superior, or by reasonable implication from some reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves. Here there are none of those things. It follows that the Respon-

(1) Court Sess. Cas. 3rd Series, vol. ix. p. 423.

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dents at your Lordships' Bar have no interest of their own, no right or cause of action against the Appellant. They are strangers to the contract in which the restrictions which they seek to enforce are contained.

The appeal therefore must be allowed, unless the fact that the vote of suspension and interdict is expressed to be "with consent and concurrence of the Governors of *Cauvin's Hospital*" makes the governors of the hospital (whom I assume to have now the title of superiority, which at the time when the several feus was granted was vested in *James Jollie*), parties suing for their own title and interest, independently of any right, title, or interest in the Respondents.

The majority of the Judges of the Second Division (Lord *Young* dissenting), appear to have thought that the Governors of *Cauvin's Hospital* were, in substance, Complainers in this action, so as to cure, by the strength of their title, any infirmity or defect in the title of the Respondents. I am not, myself, able to concur in that opinion, and I am not satisfied that it would have been the conclusion of those learned Judges if they had thought (as I do) that the Respondents had no title of their own, upon which they could sue in their own right.

The pleadings are throughout constructed upon the view that the Respondents, the feuars of No. 4 (and they only) are "Complainers" in the suit. The reasons of suspension and interdict, the answers to the statement of facts for the present Appellant, and the pleas in law for the Complainers, are those of the feuars, and of the feuars only. Nor is it easy to conceive why the superiors, if they intended to be Complainers at all, should not have been so in the ordinary form. I think it plain, upon the whole record, that the consent and concurrence of the superiors was thought necessary, and was alleged in the note of suspension and interdict, only because it was with and to them that the obligation of which the feuars claimed the benefit was originally undertaken. There is no definite averment of the superior's title, as there surely ought to have been if it had been intended to make a case on which the superiors might stand without the feuars, and which could be met by separate defences available against the superiors only.

This particular form of suit with "consent and concurrence" seems to be not uncommon in *Scotland*, when the principal parties have an interest or right of their own qualified by or dependent upon some *jus tertii* or some limitation or condition, which might be an obstacle or impediment to their suing without such consent, but which ceases to be so when they have it. No authority was cited for the general proposition that under this form of suit the consenting or concurring parties ought to be or can be regarded as sole or principal actors, when it turns out that the parties suing as principals on the record have not the interest or right which they claim. I infer from what was said by the Lord Justice Clerk, that his Lordship was not prepared to affirm that general proposition; and I have myself no hesitation in stating that I think it untenable in law.

The result is, that, considering the Respondents to be strangers, not entitled to the benefit of the restrictions in the feu contract of the 6th of June, 1782, I think this appeal ought to be allowed; and I therefore move your Lordships that the interlocutor appealed from be reversed, and the case remitted to the Court of Session with directions to sustain the third plea in law for the Appellant, and to refuse the reasons of suspension, with expenses. The costs of the appeal to this House will follow the event.

LORD BLACKBURN:—

My Lords, *James Jollie*, in the years 1782, 1783, and 1784, gave out feus of what now forms one side of *Gayfield Square*, in *Edinburgh*. His title is now in the Governors of *Cauvin's Hospital*.

The Lord Ordinary states the first question thus:

"The feus of *Gayfield Square* were given out by *James Jollie*. The Complainers (the Respondents before this House) are the proprietors of feu No. 5, while the Respondent (the Appellant before this House) is the proprietor of feu No. 2. The purpose of this action is to restrain the Respondent from building in contravention of the conditions of his feu, and to have him ordained to remove such buildings as he has built in contravention of these conditions. The first question is, whether the conditions of the feu contract of the Respondent are enforceable by a co-feuar? The Lord Ordinary thinks that they are. The feu contracts contain similar, though not identical, conditions as to building. These conditions seem to the Lord Ordinary to have been inserted for the joint behoof of the feuars, and are therefore enforceable by any one against the others."

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A great deal of house property in *Scotland* is held under feus containing in the feu charters restrictions as to what is to be done. Such restrictions are, *primâ facie*, enforceable only by the superior, who alone is a party to the contract of feu. If he has entered into another contract of feu, the superior may, if he considers that the relations he has entered into with that other feuar render it either morally or legally incumbent on him so to do, enforce those restrictions for the benefit of that feuar, though not a party to the contract which created the restrictions. It may, at first sight, seem not very material whether the restriction is to be enforced by the superior suing at the instance of the co-feuar, probably (after having taken due security for his indemnity) permitting him to conduct the litigation, or by the co-feuar direct; but practically it makes a good deal of difference. I think it must be taken as settled that where it appears that the restrictions were entered into for the benefit of other feus, either already existing or to be created by the superior thereafter, the restriction may be enforced by each co-feuar as far as his interest is concerned. It might have been better if the question whether it so appeared had been from the first considered to depend entirely on the construction of the contract of feu applying the ordinary rules of construction to the terms used in it; but there are expressions used in some of the judgments on this subject which, if taken literally, seem to go further.

As many houses are bought and sold, the price being regulated according as it is thought that the purchaser has a direct remedy to enforce such restrictions as are in his favour against his neighbours, or, on the other hand, that he can easily by dealing with the superior, and the superior alone, get relieved from such restrictions on his own property as are burdensome, I think it desirable in this, as in all conveyancing questions, not to depart from what has been established.

But I think that in the case now at Bar there is nothing to indicate that restrictions were imposed for the benefit of the co-feuars, beyond the fact that the feus were all given out nearly at the same time, and that some of the conditions inserted in the feus are similar to each other. That, and the fact (which exists in most cases where a square has been built at about the same

time, whether on land belonging to one estate or to several), that the houses are built so as to produce a considerable degree of uniformity, are all that the Respondents' counsel could point out as tending to shew that the restrictions were originally imposed for the benefit of the co-feuars; and though some expressions used by Lord President *Hope* and Lord President *Inglis* seem to indicate an opinion that this is enough to justify the conclusion that the restrictions were imposed for the benefit of the co-feuars, I think no decided judgment has yet been given on the ground that that alone is enough.

I come to the conclusion that the cases should not be carried further than they have already been, and consequently I must advise your Lordships to differ from the opinion expressed by the Lord Ordinary.

The other question is a very technical one of pleading. Practically the difference between being permitted to enforce the restrictions by suing in the co-feuar's name, with the concurrence of the superior, and by suing in the name of the superior for the benefit of the co-feuar, seems to me only to consist in the greater probability that the superior will permit the one course to be taken than the other. I think it more desirable that the superior should distinctly know what he is doing; and there being no authority in favour of the Appellant's contention, I think this point also should be decided in favour of the Respondents.

I therefore agree with the judgment proposed by the noble and learned Lord on the woolsack.

LORD WATSON:—

My Lords, the Governors of *Cauvin's Hospital* are the superiors of a piece of ground lying upon the west side of *Gayfield Square*, in the City of *Edinburgh*, which was feued out in lots for building purposes about the end of last century. The northern portion, consisting of nearly one-half, of the ground in question, was given off in five separate lots, upon each of which there has been erected a dwelling-house fronting *Gayfield Square*, with offices behind. These houses are erected on the same building line, and in front of each there is an open space twenty feet in breadth, separated from the street by a low wall and railing, which the feuar is under

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obligation to maintain. Upon the background of No. 5, which is the northernmost of these lots, there has also been erected a large hall, and upon the background of No. 4 an additional dwelling-house, these buildings having frontage to other streets belonging to the superiors. The buildings which I have just described are sanctioned by the terms of the respective feu rights, all of which contain an express prohibition against the erection of any other buildings.

The Appellant, who is now the proprietor of Lot No. 2, was proceeding to convert his dwelling-house and offices into a carriage manufactory, and the alterations which he was in course of making for that purpose included the erection of a show-room, one story in height, upon the vacant space between the house and *Gayfield Square*, and also the erection of buildings of similar character, and of considerable extent, upon the background. It was not seriously disputed at the bar, and it does not appear to me to admit of reasonable doubt, that these operations were in direct violation of that condition of the Appellant's feu right by which he is bound "not to erect any other buildings upon the said piece of ground (i.e., Lot No. 2), except the tenement of houses and walls of enclosure already erected thereon."

The process of suspension and interdict, in which the present appeal is taken, was raised at the instance of the Respondents, who, as trustees of the late *Thomas Elder M'Ritchie*, W.S., are proprietors of the feu forming Lot No. 4, "with consent and concurrence," of the superiors, the Governors of *Cauvin's Hospital*. The object of the action is to enforce the condition of the Appellant's feu contract, by interdict against the erection of any buildings on Lot 2, other than those which are expressly sanctioned by the terms of that contract.

The Lord Ordinary (1) was of opinion that the Respondents, *M'Ritchie's* trustees, had, *per se*, a good title to enforce the restriction, and he accordingly granted interdict to the effect craved. On a reclaiming note to the Second Division of the Court, the Lord Justice Clerk and Lord *Gifford* (Lord *Young* dissenting) affirmed the judgment of the Lord Ordinary on the ground that, assuming the Respondents to have no right to enforce the restric-

(1) *Rutherfurd Clark.*

tion, they were entitled to decree in respect of the consent and concurrence of the superiors, who had the right. Lord *Gifford* seems to have been of opinion with the Lord Ordinary that the feuars of these five lots were mutually entitled to enforce the conditions of their respective feu rights. So far as expressed, the opinion of the Lord Justice Clerk upon that point is unfavourable to the Respondents. Lord *Young* held that the Respondents had of themselves no title to sue, and that the Appellant must prevail, because the defective instance of the Respondents could not be validated by the mere consent and concurrence of parties having a good title to insist for the same remedy in an action at their own instance.

It is settled by a series of decisions in the Courts of *Scotland*, that every one of a class of feuars deriving their title from a common superior, may have an implied right, or *jus quæsitum*, to enforce conditions occurring in contracts between the superior and his co-feuars, to which he was not a party. In some cases it is made a matter of express stipulation by the superior, in contracting with his vassals, that each of them shall have that right. The right in those cases, when it has been held to arise by implication, appears to me to have been originally admitted upon considerations of expediency, and partly with the view of avoiding circuitous and unnecessary litigation.

Both parties, in their argument at the Bar, assumed, and rightly assumed, that in order to the constitution of such a *jus quæsitum* it is essential that the conditions to be enforced shall appear in all the feu rights, that they shall in all cases be similar, if not identical, and of such a character that each feuar has an interest in enforcing them. But the Respondents carried their argument so far as to maintain that these considerations, where they are found to co-exist, sufficiently indicate that the conditions of feu were intended for the mutual benefit of all the feuars, and must therefore be held to confer upon each feuar a right of action against his co-feuars for the enforcement of these conditions. The Respondents did not assert that the proposition thus advanced by them has as yet been judicially determined in their favour, but they did maintain that it is strictly in accordance with the principle of the decided cases, that contention being founded mainly,

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if not altogether, upon certain *dicta* of Lord President *Hope* in the case of the *Governors of Heriot's Hospital* v. *Cockburn* (1), and of Lord *Ardmillan* in the recent case of *Robertson* v. *North British Railway Company* (2). In the latter case Lord *Ardmillan* said: "Where in titles originally springing from the same person there is an undoubted and substantial interest in one feuar to enforce a restriction such as this, partaking of the nature of a servitude, against another feuar, the law will recognise a title available and sufficient to support his interest and to enforce the restriction."

If these words were taken as a complete statement of the law applicable to cases like the present, they would support the contention of the Respondents, and so would the language used by Lord President *Hope* in the *Governors of Heriot's Hospital* v. *Cockburn* which I have not thought it necessary to quote. The soundness of Lord President *Hope's dicta* has been seriously questioned in subsequent cases, but I doubt whether either of the learned Judges intended, in the passages relied on by the Respondents, to give an exhaustive definition of what is requisite in order to create a right in one feuar to enforce the conditions of another feu. Their statements of the law are unimpeachable if read with reference to the circumstances of the case in which they were uttered. If they were intended to have a wider application, they were unnecessary for its decision.

The fact of the same condition appearing in feu charters derived from a common superior, coupled with a substantial interest in its observance, does not appear to me to be sufficient to give each feuar a title to enforce it. No single feuar can, in my opinion, be subjected in liability to his co-feuars, unless it appears from the titles under which he holds his feu that such similarity of conditions and mutuality of interest among the feuars either had been or was meant to be established. According to the tenor of the feu disposition, or feu contract, as the case may be, the feuar and his superior are the only parties to it; and I am of opinion that no *jus quæsitum* can arise to any *tertius* except by the consent of both these contracting parties. That being so, unless the feuar, either

(1) 2 W. & S. App. Cas. at p. 302.
(2) Court Sess. Cas. 4th Series, vol. i. p. 1218.

in express words or by implication, gives his consent to the introduction of a *tertius*, the superior cannot as against him create any such interest, by imposing the same conditions to which he has submitted upon the other feu in his vicinity.

In dealing with this question it is necessary to keep in view that when the feuar has a *jus quæsitum*, his title, and that of the superior, to enforce common feuing conditions are independent and substantially different rights. The title of the superior rests upon contract, a contract running with the estate of superiority and burdening the subaltern estate of the vassal. The right of the feuar, though arising *ex contractu*, is of the nature of a proper servitude, his feu being the dominant tenement; consequently he cannot enforce it against other feuars except in so far as he can qualify an interest to do so. Again, the superior's consent to discharge the condition cannot affect the right of the feuar, and as little can the feuar's renunciation of his servitude impair the superior's right to enforce the condition. It appears to me that it would be unreasonable and contrary to all principle to hold that a feuar was subject to such a servitude, except upon evidence warranting the inference that in accepting a title to his own feu he had it in contemplation, and tacitly agreed, that such a burden should be imposed upon him. And seeing that the burden when imposed affects the land which is the subject of his feu, I think the evidence of his consent to its imposition can only be derived from the titles under which his feu is held. What kind or amount of evidence derivable from his titles will suffice to indicate the feuar's consent, is a question which must depend upon the circumstances of each case.

If the *dicta* upon which the Respondents found were to be taken *per se*, and as expressing all that is required in order to create mutual servitudes as between the feuars, the superior would necessarily have the power of creating such servitudes without the consent, and even against the wish, of the feuars burdened thereby. I should not have been prepared to except to that view of the law, had I been of opinion that the creation of such servitudes was in substance and effect nothing more than an assignation to each feuar of the superior's right as against his co-feuars. But the effect of an assignation is to divest the cedent of his right, at least

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to the extent to which it is assigned; whereas the effect of creating mutual servitudes among the feuars is to leave the superior's right as against each of them undiminished and unimpaired, and to subject the feuar in liability to a body of servitude owners, whose interest, as well as that of the superior, he must purchase or settle for before he can obtain a release from the conditions of his feu charter. I know of no principle upon which that liability ought to be imposed upon a feuar except of his own consent; and, so far as I am aware, there is no decision by which his liability has been affirmed in the absence of evidence from which his consent was matter of legitimate inference.

The first case in which it was held that each member of a class of feuars had an implied right to enforce a common condition was that of the *Governors of Heriot's Hospital* v. *Cockburn* (1) already referred to. But the judgment of the Court of Session was reversed by this House, as being unnecessary to the disposal of the cause. The next decision was in the *Magistrates of Edinburgh* v. *Macfarlane* (2), and similar judgments have been given in subsequent cases. All of these appear to me to fall under one or other of two categories, either (1.) where the superior feus out his land in separate lots for the erection of houses, in streets or squares, upon a uniform plan; or (2.) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him.

To the first of these categories belongs *M'Gibbon* v. *Rankin* (3). The superior in that case had laid off a piece of ground for the formation of a continuous line of houses or terrace, and from time to time granted separate feu charters of the site of each house, and in each charter there occurred the same condition regarding the size and design of the buildings to be erected, coupled with a stipulation that it should be inserted by the superior in all the other feu rights of the terrace. The Defender, who was infringing the condition, objected to the title of the Pursuer, whose charter

(1) 2 W. & S. App. Cas. at p. 302.
(2) Court Sess. Cas. 2nd Series, vol. xx. p. 156.
(3) Court Sess. Cas. 3rd Series, vol. ix. p. 423.

of feu was posterior in date to his own; but the Court held that, in stipulating that the condition should be imposed upon his co-feuars, the Defender must have had in contemplation that it was to operate for the mutual benefit of all the feuars, and be mutually enforceable by them.

Robertson v. *North British Railway Company* (1) affords an illustration of the cases falling under the second category. A superior feued to *A.* a piece of ground lying within the City of *Glasgow*, subject to the restriction, *inter alia*, that no part of it should be used for the storage of manure; and on the express condition that the restriction was to be imposed by *A.* upon all his disponees or sub-feuers. *A.*, without taking infeftment, conveyed part of the ground to *B.*, and the remainder to *C.* The restriction was duly inserted in the feudal title completed by *B.*; but *C.* made up his title without any notice of the restriction, and subsequently conveyed to *D.*, a singular successor, against whom an action was brought to enforce the restriction, by a Pursuer deriving right from *B.* The Defender maintained that the restriction was not validly imposed upon him, and that, even if it were, *B.* and those in his right had no title to enforce it. As to the first of these points, the majority of the First Division were of opinion, upon grounds which appear to me to admit of considerable doubt, that the restriction was well imposed upon *D.* as well as upon his author *C.*; and upon that footing their Lordships were of opinion that it was a mutual restriction, and that *B.* had a good title to compel its observance by *D.*

The *ratio decidendi* in such cases as *M'Gibbon* v. *Rankin* (2) seems to have been that a feuar, who stipulates with his superior that a particular restriction shall be imposed upon all his fellow feuars as well as upon himself, must intend that he shall have the power of enforcing it against them, and that they shall have the like power as in a question with him. In *Robertson* v. *North British Railway Company* (1), and similar cases, the principle of decision appears to me to have been that a sub-feuar or disponee acquiring a building lot, subject to a particular condition, with notice in his titles that the common author, whether his imme-

(1) Court Sess. Cas. 4th Series, vol. i. p. 1213.

(2) Court Sess. Cas. 3rd Series, vol. ix. p. 423.

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diate or over-superior, has imposed that condition upon the whole area of which his lot formed a part, must be taken as consenting that the condition shall be for mutual behoof of all the feuars or disponees within the area, and that all who have interest shall have a title to enforce it. In other words, the feuar is held as consenting to be bound by the law laid down by the common author for the benefit of all future feuars. I have been unable to find any decision proceeding upon the principle that a superior who feus out a portion of his estate to *A.* under a precise restriction as to building, and who, in giving a title to *A.*, neither undertakes, nor intimates an intention, to impose similar restrictions in feuing the remainder of his ground, can thereafter confer upon every feuar who acquires a building lot in the vicinity a *jus quæsitum* enabling him to sue *A.* directly.

In the present case, the Respondents' title to sue appears to me to fail in two essential particulars. The titles to the Appellant's feu are of older date than those of any other of the five lots in question, with the exception of Lot 3, which was originally included in the same feu contract of the 6th of June, 1782. That deed lays no obligation upon the superior to observe any limitation in building upon the adjacent ground, or to impose any such limitation upon those to whom he might subsequently feu or dispone it. No doubt there are words occurring in the deed from which it might be inferred that it was in the view of the superior to feu the adjoining ground on both sides; but there is not a single expression which can reasonably be held to indicate the superior's intention to restrict the adjoining feuars, and still less to imply that he meant to come under an obligation to that effect. Again, the several restrictions as to building contained in the titles of the Appellant and the Respondents do not, in my opinion, so resemble each other as to raise the inference that they were intended to be mutual. These restrictions are, in both sets of titles, expressed in the same words; but in substance they are very different. The one is a prohibition against building anything except a single house, fronting *Gayfield Square*, with offices. The other is a prohibition against building anything more than two dwelling-houses, with offices, the one fronting to *Gayfield Square* on the east, and the other to a street on the west. The restriction imposed upon

the Appellant has, in the case of the Respondents, been departed from to the extent of allowing them to build a second dwelling-house upon the west end of their feu—a departure which seems to me to be fatal to the existence of that similarity and consequent mutuality of restriction upon which the argument of the Respondents was mainly rested.

I have accordingly come to the conclusion that the Respondents had and have no title, in their own persons, to raise and insist in the present action. That leaves the question whether their right to sue, which I assume to be *nil*, has been validated by the consent and concurrence of their superiors, to the effect of entitling them to decree in the terms of the prayer of the note of suspension and interdict.

It was argued for the Appellant that the superiors, the trustees of *Cauvin's* Hospital, have waived their right to enforce the restriction in his titles, by permitting others of their feuars in the vicinity to violate the building conditions to which they were subject. If that proposition were clearly made out, it would be sufficient for the disposal of the case; but I am unable to adopt the Pursuer's argument, which was necessarily based upon an implied obligation on the part of the superiors to impose and enforce these conditions for his behoof. It appears to me that the case must be disposed of on the footing that the superiors have still a good title to enforce the restriction as against him; and that they have given their consent and concurrence to the instance of the Respondents. I think the Appellant is barred, by his pleadings on the record, from maintaining that such consent and concurrence was not in point of fact given. Upon this branch of the case I concur in the views which were expressed by Lord *Young* in the Court below. Actions at the instance of one party with the consent and concurrence of another, are of every day occurrence in the practice of the Courts of *Scotland*. In all such cases, the proper instance is that of the leading Pursuer or Complainer who sues in his or her own right and title. Thus a wife, *stante matrimonio*, sues with consent of her husband, and a minor with consent of his curators; but the right of action is vested in the wife and the minor only, and decree passes in their favour, the interposition of their legal guardians, as parties consenting,

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being merely required as a judicial precaution against any neglect of their interests in the conduct of the suit. Various other illustrations of the practice are to be found in the opinion of Lord *Young;* and it is unnecessary to repeat them here. But I know of no authority for holding that, according to the law or practice of *Scotland,* a person, who has no right or title whatever, can sue an action, provided he obtain the consent and concurrence of the party to whom alone such right or title belongs.

The reasons assigned for their judgment by the Lord Justice Clerk and Lord *Gifford* appear to me to be unsatisfactory. The Lord Justice Clerk deals with the case as if the superiors had the primary right and the Respondents "a subordinate and derivative title to enforce" the restriction in question. If the Respondents were really possessed of a subordinate and derivative title, I should come to the same conclusion as his Lordship; but that is not their true position. The Respondents may, indeed, have an interest to prevent the erection of the buildings contemplated by the Appellant; but their interest is no greater than it would be if they had no feudal relation to the superiors of the Appellant's feu, or if there were no restriction in the Appellant's titles. They have no right or title primary, or subordinate, to enforce the restriction, neither have they any title to compel the superiors to enforce it. Lord *Gifford,* on the other hand, seems to hold it conclusive of the present question that "he who is merely a consenter to a disposition of heritage is held to be really a disponer, if the true title of the subject be found to be in him." That illustration embodies a correct statement of the law, but it has no bearing upon judicial procedure; and if admitted as an analogy would necessarily lead to the result that any stranger might insist in an action with regard to landed estate, in which he had no right or interest, provided he sued with the consent and concurrence of the proprietor.

It was suggested by Lord *Gifford* that the instance of the Respondents, assuming it to be defective, might be cured by amending the libel, to the effect of allowing the superiors to stand as Complainers for their interest, under the provisions of sect. 29 of the *Court of Session Act* of 1868 (31 & 32 Vict. c. 100). That clause enacts that "all such amendments as may be necessary for

the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." I cannot doubt that the amendment proposed by the learned Judge would have been unwarranted by the terms of the statute, which contemplate alterations on the record with the view of facilitating the determination of the real questions at issue between the original parties, but not the importation of new parties into the litigation.

On these grounds, I am of opinion that the interlocutors under appeal ought to be reversed, and a remit made in the terms proposed by your Lordships.

JUDGMENT:—*Ordered and adjudged* that the said interlocutors complained of in the said appeal be, and the same are hereby reversed, and that the cause be remitted back to the Court of Session in *Scotland*, with directions to sustain the third plea in law for the Appellant, and to refuse the reasons of suspension, and find the Respondents liable in expenses, and to ordain the Respondents to repay to the Appellant the expenses in the Court of Session: and it is further *ordered*, that the Respondents do pay or cause to be paid to the said Appellant the costs incurred in respect of the said appeal to this House.

Lords' Journals, 23rd June, 1881.

Agent for Appellant: *William Robertson.*
Agent for Respondents: *Frank W. Reynolds.*

[HOUSE OF LORDS.]

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M'BAIN . . . . . APPELLANT;

WALLACE & Co. . . . . RESPONDENTS.

Contract to purchase—Article in Course of Completion—Unfinished Ship—Bankruptcy—Security—Delivery of Article before Sequestration—Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 *Vict. c.* 60), *s.* 1.

By the law of *Scotland* there must be delivery to give effect to a contract of sale, but the *Mercantile Law Amendment* (*Scotland*) *Act* for the express purpose of assimilating the law of *Scotland* to that of *England* on such points, enacts: "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing the delivery of the same."

B. & C., by verbal communing, agreed to make advances to *A.* on the security of a ship he had nearly completed building on his own account, provided *A.* entered into an absolute contract of sale of the vessel. An unqualified contract of sale was completed by which *A.* agreed to complete and deliver to *B. & C.* the vessel, for a price to be paid in two instalments, with power to *B. & C.*, in the event of *A.* failing to complete the contract, to enter into possession of the vessel and complete it, or sell it.

In a correspondence between *A.* and *B. & C.* and a shipbroker and others subsequent to the contract, and for the purpose of getting a purchaser for the vessel, the ship was called *A.'s* ship; but no letters were written to any persons who were induced by their means to deal with the ship upon the footing of its being the property of *A.*

From the date of the contract *B. & C.* gave, by cheques at various dates, advances to *A.*, taking a receipt on account of the purchase of the ship; at the same time bills for like amounts were accepted by *A.* The advances equalled the full price of the ship. Before it was completed or delivered *A.'s* estate was sequestrated. The bills accepted by *A.* were paid by *B. & C.* In a question between *A.'s* trustee and *B. & C.*:—

Held, (1) affirming the decision of the Court below, that there was here a *bonâ fide* sale in fact and intent unaccompanied by delivery, and—whether security was the object or not—every condition of the statute was fulfilled; (2) that no reputation of ownership had been created in the seller *A.* Therefore *B. & C.* had a right to the ship.

Held, where there is an absolute *bonâ fide* contract of sale of an article, which is not delivered before the bankruptcy of the seller, the right of the

buyer under the contract to have delivery cannot be defeated by proof that the character of buyer had been conferred on him merely for the purpose of his having a security for money intended to be advanced by him.

APPEAL from a judgment of the Court of Session.

In 1875 *James Roney* commenced business as a shipbuilder in *Arbroath*. Towards the end of that year he commenced to build as a speculation on his own account a three-masted schooner of about 927 tons burden. This vessel he entered on his books as No. 2, and for the purposes of survey she was also entered at *Lloyd's*. Towards the end of 1877 her hull, with all her internal arrangements, were all but completed and ready for launching. From that time down to the present she has remained in that state, with the exception of having received coppering and a false keel. In building the vessel No. 2 and three others to order *Roney*, by August, 1877, had incurred considerable liabilities. In particular he had then obtained and discounted an accommodation bill for £500 from *John Wallace & Co.*, the Respondents, iron merchants, *Dundee*; and he had also incurred liabilities to that firm to the amount of £300 for goods. *Roney* being unable to meet the obligations contracted by him, after verbal communings with the Respondents, signed a contract, dated the 17th and 25th of January, 1878, for the completion and sale by him, and the purchase by them, of the vessel No. 2 in consideration of the sum of £2500, &c.

The important clauses of this contract are as follows:

(3.) It is hereby agreed and declared that when any sum shall be paid or appropriated by the second parties towards payment of the said price, the said vessel in her present unfinished state, and at the stage of her build at which she has reached, as shewn by the said specification, and all materials and articles of wood or iron or other metals of every description, furnished or unfurnished, and whether made up or not, but intended or destined to be used in the construction, fitting-up, and completion of the said vessel, and her appurtenances, which shall be lying or situated in or about the vessel, where she is building, or elsewhere in or near the shipbuilding yard or other premises occupied by the first party at *Arbroath*, shall thereupon *ipso facto*, to all intents and purposes, become and remain the property of the second parties, although they may be used by the first party as materials for the completion of the vessel or of her appurtenances, and it is further and in like manner agreed, that all subsequent additions made to the vessel and her appurtenances as the work proceeds, and all additional materials and articles of any description that shall be brought to or belong, or be situated as aforesaid, intended or destined to be used in the construction, fitting up, and

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completion of the vessel or her appurtenances, shall *ipso facto* of such intentioned destination or situation become and remain the property of the second parties, although, without prejudice to such right of property they may be used by the first party as materials for completion of the vessel or her appurtenances as before mentioned; and generally it is hereby agreed that the said vessel and her appurtenances, or any part thereof, or materials or articles intended or destined for the completion of the same as aforesaid, shall not be or become liable to any debts, contracts, or engagements of the first party, or be otherwise affected by or attachable for his acts or deeds, or be at his order and disposition, but shall, subject to the uses foresaid, be and remain the absolute property of the second parties: Declaring that the instalment of price applicable to the present stage of the vessel's build is agreed to be two thousand pounds sterling, and that the final instalment of price payable for the vessel and her appurtenances on complete fulfilment of this contract and said specification, is five hundred pounds sterling, making together the foresaid price of two thousand five hundred pounds sterling, which respective instalments shall be payable on the completion of the said vessel and its appurtenances, to the second parties' satisfaction, and after the vessel has been launched by the first party, and full legal possession thereof received by the second parties . . . . But it is hereby agreed that if the second parties shall elect to pay, or appropriate any sum or sums for settlement of any part of the foresaid instalments sooner than the date fixed for payment thereof, then and in that event the sum or sums that may be so paid or appropriated shall bear interest from the date of advance or settlement at the rate of five pounds per centum, and the advance or advances and interest thereon shall be deducted from the foresaid price at final settlement.

(5.) The first party agrees and binds himself to launch and deliver the said vessel and her whole appurtenances completed as aforesaid, with the certificates and other necessary documents before mentioned, within three calendar months from the date or last date hereof; and he further agrees and binds himself, at his own expense, to insure the vessel and appurtenances, &c.

(6.) In case the first party shall suspend the work on the vessel or her appurtenances, unless compelled to do so from the effects of fire or bad weather, or strike of workmen, to such an extent as to cause a suspension of work, or if he shall refuse or fail to carry out and complete this contract, and said relative specification as hereinbefore agreed to, then and in any such case it shall be lawful for the second parties, by themselves or others employed by them, and without any judicial warrant, unless they may consider such expedient, but only after a previous notice to the first party of fourteen days by letter, . . . to enter into and upon the first party's shipbuilding yard and premises at *Arbroath*, and take and retain possession thereof, and of the whole materials and articles intended and destined to be used for the purposes of this contract and said specification, and thereafter to sell the said vessel and her appurtenances, and the materials and articles before referred to, or any part thereof, in the condition in which they may then be, at valuations to be put thereon by the arbiter after mentioned; and failing such valuation, then by public sale, on such terms as the second parties may think proper, and to receive and discharge the prices thereof, and apply the free proceeds, after deduction of all costs and charges, towards repayment of any instalment or portion of any instalment of the price that may have been advanced

or appropriated by the second parties as before mentioned, and any other payments or outlays that they may have made or incurred in the premises, with interest thereon from the date of advance, at the rate foresaid. And after full payment and satisfaction to the second parties in the premises, and relief and re-imbursement to them of all obligations, payments, and charges of every kind, which they may have contracted or incurred in relation to this contract and the consequents thereof, and any other debts or obligations due and owing by the first party to the second parties, on any other ground whatever, relating thereto or not, any free balance shall be paid to the first party; or the second parties may, if they see fit, instead of selling the vessel and her appurtenances, and the said materials and articles, or any part thereof as above mentioned, complete the vessel and her appurtenances, in terms of the present contract and said relative specification, and for these purposes employ all necessary workmen, and use all the machinery, working tools, implements, stock, and material of every kind necessary for such purposes, in and about or near the said premises of the first party situated at *Arbroath*; and in case the second parties shall expend any sums in so completing the vessel and her appurtenances, over and above the said contract price, the same, with all costs and outlays incurred by them, shall be recoverable by them from said first party.

On the 24th of April, 1880, the estates of *James Roney* were sequestrated, and the Appellant, *James M. M'Bain*, banker in *Arbroath*, was elected trustee thereon.

Four days after the sequestration the Respondents gave notice that on the 17th of May, 1880, in terms in particular of clause 6 of the contract, they would enter Mr. *Roney's* shipbuilding yard at *Arbroath*, and take and retain possession thereof, and of the whole materials and articles intended and destined to be used for the purpose of the said contract; and thereafter either to sell the vessel and her appurtenances and the materials or articles referred to, or complete the vessel and her appurtenances, in terms of the said contract and specification.

The Appellant thereupon raised this action by a process of suspension and interdict, praying to have the Respondents interdicted from entering upon and taking possession of *Roney's* shipbuilding yard and articles therein, and from selling or completing the said vessel and her appurtenances.

The Appellant averred:

(Stat. 6.) The price of the vessel was under the contract stipulated to be paid on the completion of the ship, which, by article fifth of the contract, was to be within three months from the last date thereof. The vessel, however, was not finished within the three months, and is not even now completed, she being still on the stocks. No part of the pretended price of the said vessel has been paid;

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but the Respondents who had already made advances to *Roney* of £800, continued from time to time to make advances to him, for which they afterwards drew on him, and discounted at the *Royal Bank* in *Dundee*, his acceptances. The Respondents charged interest and commission on the same, the reality of the matter thus being simply that, in respect of certain sums of commission, the Respondents lent their names to *Roney*, who obtained the proceeds arising from the discounting of his own acceptances, &c.

(Stat. 12.) The intention of the parties in entering into the foresaid contract was, that it should be simply as a security for the debt already due by Mr. *Roney* to the Respondents, and for the accommodation bills to which they were to become parties for his behoof. And accordingly, after the contract was entered into, Mr. *Roney* was left by the Respondents in the uncontrolled possession, management, and ownership of the schooner. They got and took no possession, symbolical or otherwise, and in no shape interfered with Mr. *Roney* with reference to the ship. The contract has all along been kept latent, and has not been published or made known to any one. From time to time Mr. *Roney* corresponded with various parties with a view to a sale of the vessel. He advertised her in his name, and at his own expense, to be disposed of. He was under no restraint, verbal or otherwise, from selling the ship, so far as the Respondents were concerned. He met them very frequently when in *Dundee*, and communicated to them his prospects of selling the vessel, and they never sought to control him as to the amount of the price he asked for the ship, nor even indicated that they had any right or interest in her, other than a right in security for the accommodation transactions above mentioned. On the contrary they corresponded with him on the footing that the vessel was his vessel, and in their correspondence they asked him the lowest price at which he would sell her. The ship was not finished within the three months prescribed by the contract, and the Respondents in no shape urged Mr. *Roney* to finish her within that time, nor did they at the end of the three months, or at any other time during the period of two years and four months which has elapsed since the date of the contract, give any intimation to him of the consequence of his non-completion of the vessel, and not until the notice had they ever attempted to make an absolute claim to the ship.

His material pleas in law were:

(1.) The vessel and others not having been sold to the Respondents, and no price having been paid for the same, the Respondents are not entitled to take possession of them. (2.) There having been no delivery to the Respondents of the vessel and others in question, interdict should be granted as prayed for. (3.) The transaction between the Respondents and the bankrupt being one by way of security only, and this fact being instructed *in gremio* of the contract, the Respondents are not entitled, as in a question with the trustee on the bankrupt's sequestrated estate, to insist on delivery of the vessel and others, and for that purpose to take at their own hand possession of the bankrupt's shipbuilding yard, stock, and plant, as intimated by them.

The material portions of the Respondents' answers were as follows:

(Ans. 6.) Denied that no part of the price had been paid. On the contrary,

sums in all amounting to £2550 were received by *Roney* to account of the price of the vessel, conform to cheques in his favour granted by them, and relative receipts granted by him.

(Ans. 12.) Denied that the contract was intended to be only in security, or that there were any accommodation bills for *Roney's* behoof. When the contract is fulfilled, the Respondents will have no further claim against the bankrupt or his estate beyond the sum of £227 or thereby, due to them for furnishings, and unconnected with the price of the vessel. Admitted that the vessel not being finished or ready for launching, remained on the stocks in the shipbuilder's yard, but denied that the contract was kept latent, and that possession was not taken by the Respondents. It was well known in both *Arbroath* and *Dundee*, amongst bankers, insurance companies, and men of business generally, that the vessel had been acquired by the Respondents. Further, that when *Roney* was endeavouring to find a purchaser, it was at their request, and in doing so he was acting solely for their behoof.

Their pleas in law were, *inter alia*:

(2.) The contract being a contract of sale and reduced to writing, the allegation that it was truly a security cannot be proved otherwise than by writing. (3.) When a ship is purchased on the stocks on the terms that it shall be finished and launched by the builder, and paid for by instalments, the property of the materials as they are put together, at all events after payment of the first instalment, belong to the purchaser, and not to the trustee in the builder's bankruptcy. (4.) The right of a trustee in a sequestration being *tantum et tale* as it stood in the person of the bankrupt, and the Respondents having bought the vessel and paid the stipulated price, they are entitled to delivery and possession in terms of the contract. (5.) Assuming that the transaction amounted to a security only, the transfer being *ex facie* absolute, the complainer is not entitled to possession, except on payment of the sums received and due by the bankrupt to the Respondents.

Roney being examined in the proof allowed stated, *inter alia*:

When I found myself in difficulties in the beginning of 1877, I asked Mr. *Stewart*, one of the partners of the Respondents' firm, if he could advance any money, and he gave me an accommodation bill for £500. I was the acceptor on the bill. My liabilities went on increasing during the year 1877. I had a trade account with the Respondents at this time. In September, 1877, it amounted to £600 odd, and I paid £300 odd, and granted a bill for £300. I was thus indebted to the Respondents upon bills to the amount of £800. When these bills fell due I was unable to meet them. About the end of the year 1877 I met Mr. *Wallace* and Mr. *Stewart* in their office in *Dundee*, with the view of getting the bills renewed (those for £500 and £300). They demurred to renewing the bills, unless I could give them some security. They asked how I stood about my affairs? I explained how I was hampered with this vessel on the stocks,—that I could not get her sold, that I could not get any money on her, and that if I had her sold I would be able to meet the bills. After some talk I offered to give them the vessel if they could raise any money on her in security for the bills,—to allow them to lie over till I got the vessel sold. Mr. *Wallace*,

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I think, suggested they should consult Mr. *Thomson* about it. I came back next day, or the day after, and Mr. *Stewart* and I called upon Mr. *Thomson*, solicitor, *Dundee*. It appeared that Mr. *Wallace* had been there before us, because Mr. *Thomson* knew what we had called for. He explained that the Respondents could not take a mortgage on the vessel unless she was launched and registered, and that the only way would be a sale. I understood that this was the only way in which they could take the vessel as security. It was then arranged that the bill of sale, or whatever it is, should be made out in that way, and that they should advance the money as I required it in the future on the vessel. There was no price agreed on. The reason why £2500 was put in was that Mr. *Stewart* asked me in the office if £2500 would put me over my difficulties till I got the vessel sold, and I said, "Plenty; perhaps I would not require it all if I got her sold soon." I agreed to grant the security in the form of an absolute conveyance. In the first arrangement the £2500 was put in for the vessel without an outfit—that is, just the hull and spars—but when the contract was made out it embraced the whole outfit, to make the vessel ready for sea. I was never even consulted about that. Mr. *Thomson* prepared the conveyance, and Mr. *Stewart* and I signed it in Mr. *Thomson's* office on the 17th of January, 1878.... £2500 was mentioned for the vessel finished. She would be worth close upon £4000 at that time. I would not have sold her for anything like £2500 then. I got £2950 for her subsequently, and vessels had very much depreciated in value during the interval. After signing the contract in January, 1878, I got an advance of £400 from the Respondents, and I granted a bill for £600. The £500 bill was renewed, and the £300 bill was renewed to the extent of £180, the remaining £120 being allowed to lie over. I got various advances from the Respondents during the years 1877-78, for which I granted receipts. The mode in which those advances were made was by bill drawn by the Respondents, accepted by me, and discounted by them. I generally got a cheque from them, but not always, for the full amount of the bill drawn. When I got those cheques I granted receipts in the terms of No. 74. On one occasion they got a receipt for £120, when no money passed at all. It was the balance of a bill for £300. They asked for a receipt for that sum as if they had paid it to me, which they had not done. The form of receipt was written out by Mr. *Thomson* on the day the contract was signed, and it was adhered to right through. I agreed to grant receipts in those terms without any remonstrance. I asked a back-letter from Mr. *Stewart* a week or two afterwards. I demurred to granting receipts and accepting bills at the same time. I thought they were having too much security over the vessel. I said to Mr. *Stewart* it was all well enough as between him and me, but something might happen to either of us, and then they could claim the vessel. "Oh," he said, "never mind that; the heavens might fall," and he did not give me the back-letter.... The amount for which I have given receipts is £2550.....

Mr. *David Stewart* said:

I am a partner of the Respondents' firm. All the transactions between our firm and *Roney* were carried on through me. In the end of 1877 there were bills current due by *Roney* to the amount of £845 8s., £500 being for cash lent, and £345 8s. for goods. He called at my office in November, 1877, and told me he had been at Mr. *Hutton*, and that Mr. *Hutton* had declined to give him assistance.

He said that no banker would advance money on the security of a ship on the stocks. I suggested that he should apply to Mr. *Mackenzie*, the agent of the *Royal Bank* at *Dundee*. I accompanied him to Mr. *Mackenzie*. Mr. *Mackenzie* would not accept the security. He said that nobody would advance money on the security of a ship on the stocks, unless against a buying contract. Some weeks afterwards *Roney* again called at my office. He then wished to get his ship sold. He had been trying before that to get her sold. I suggested that he should see Mr. *Charles Robertson*, who manages a number of ships in which I am interested. I called upon Mr. *Robertson* with him twice, but we were not able to induce Mr. *Robertson* to buy. *Roney* came back to me early in January 1878, and asked whether we could not buy the ship ourselves. I said we had quite enough of shipping, unless we could get a bargain of it. I said I would consult my partner, Mr. *Wallace*, who lives in *London*. *Roney* on this occasion suggested a price, £2500. I understood that was to include the completion of the vessel, and to make her ready for sea. Mr. *Wallace* came down to *Dundee* and saw *Roney*. At the meeting which took place, Mr. *Wallace* spoke about buying the vessel at the price named by *Roney*, but said he would go to Mr. *Thomson* and see if he could prepare a proper buying contract that would keep us secure for what we were to pay for the vessel until she was launched. The reason why he desired to see Mr. *Thomson* was that the vessel was then on the stocks unfinished. . . . On the 18th of January, *Roney* and I called at Mr. *Thomson's* office. The contract was read over by Mr. *Thomson's* clerk, and *Roney* heard it read. We there and then signed it, and it was sent to *London* for Mr. *Wallace's* signature. On our return to my office that day, Mr. *Roney* said—"Now, suppose you were to sell this ship for more than £2500, what is my position to be?" I said, "You have signed a contract for sale." "But," said he, "suppose you were to make a big profit," and he wanted a back-letter. I said, "There will be no back-letter. There is no understanding or misunderstanding upon the subject with me, and neither let there be with you. It is an out-an-out contract of sale, and any agreement, verbal, implied, or written, may vitiate the contract." I throughout held this contract to be an out-an-out absolute sale. *Roney* never again asked me for any back-letter or qualification. I paid him £400 after the contract was signed, and obtained a receipt. For every cheque I gave him there is a receipt, but there is one receipt for which there is no cheque—viz., £120. We had retired a bill of his for £120, and we accordingly sent a receipt to him to be signed, because in fact we were paying cash on his account. We have paid altogether £2550 to account of the price of the ship, or £50 more than was stipulated. There was to be some extra work done, *Roney* said, and he very much wanted the £50. The bills drawn upon *Roney* after the date of the contract had no connection with the cash that passed at all. The object of getting those bills, I told *Roney*, was, that we required to be kept in our cash advances till we had re-sold the vessel. We were not bound to pay till the vessel was launched. *Roney* agreed to that. He never incurred any liability whatever in connection with those bills. We have paid every one of them. There is no charge in our books against him in connection with discount or anything else. The bills were drawn, it might be, up to the amount of the advances, or it might be something different; no attention was paid to that at the time. In our books the full amount is put to his credit, and the cash to his debit. . . . Some months after

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the date of the contract, I spoke to *Roney* about the number of ships that we had and told him they were not paying, and I asked him to take steps for selling the ship in question. He promised to do so, and he told me that he had advertised in the *Shipping Gazette*. This was some time in 1878. He and we both made efforts to sell, but without effect. The policy of insurance on the vessel was transferred to our name immediately after the contract was signed. Nothing ever passed between me and *Roney*, authorizing him to treat the vessel as his property, either on her completion or on getting her sold. . . . When *Roney* asked for the back-latter he seemed to have a floating idea in his mind that the ship had been parted with as security. I suspect I must have known what he meant when he asked for the back-letter. He seemed to think that the transaction, though in shape a transaction of sale, was in reality a security. I at once refused to give a back-letter, assigning as a reason that it might vitiate the contract? *Q.* Why were you afraid of the contract being vitiated?—*A.* Because we wanted to be absolutely safe, and have the contract to express actually what it was. *Q.* Were you afraid that if you granted the back-letter it might be found out that the contract was one of security only?—*A.* A back-letter might have indicated that. *Q.* And you were afraid of that?—*A.* Well, I was just wanting to go upon the contract, and there was no occasion for him asking a back-letter. My explanation of the words I used is this, that if we had parted with the money without a proper buying contract, we might have been held as taking security, and there was no occasion for a back-letter, seeing a proper buying contract had been signed by both parties. Had this vessel been sold for more than what paid our debt, I would have considered myself morally but not legally bound to account to *Roney* for the access, because he had been in business for a while and lost a lot of money, and we did not want to make a profit of his necessities. I was willing to give him a share of the profit. I don't know whether he understood that too; but that is what I would have done, though only from moral obligation. *Q.* Was that not what you understood at the time was to be done?—*A.* It was never so expressed. [Question repeated.] *A.* There was no understanding. *Q.* Was it not really in your mind at the time that that was to be the result of the transaction?—*A.* I suppose may be it was; at the same time we must keep ourselves legally right whatever our moral obligation may be. The money was not to be paid till the ship was launched, but it was perfectly understood that *Roney* was to get money from us as his necessities required. We were not to hurry him with the completion of the ship. He was to take his own time to it; it was a sort of stock job for him.

The following letters, with others, were produced:

Wallace & Co. to *James Roney*—4 May, 1878.—Dear Sir,—Please send full particulars of the three-masted schooner to Mr. *David Mackenzie*, shipbroker, *London*. For *Anderson* of *London* has just lost one. *Mackenzie* is employed trying to get one to replace. Let the particulars be as full as possible; size of hatchways, whether beams in hold, and lowest price, &c.

Wallace & Co. to Messrs. *Broadwood, Jones, & Co., Leadenhall Street, London.* —1 Sept. 1879.—Kindly keep Mr. *Roney's* ship which he has for sale in mind, we are interested in this vessel, and are very anxious to have it sold at even a cheap price.

Messrs. *Broadwood, Jones, & Co.* to *Wallace & Co.*—6 Sept. 1879.—Referring to yours of 1st inst. respecting Mr. *Roney's* ship, we find that he is asking £3600 for her. This is a very high price.

Wallace & Co. to *James Roney*—6 Sept. 1879.—Enclosed is letter for *Broadwood, Jones, & Co.* Is £3600 the very lowest at which you would be disposed to sell. Please say for our guidance.

James Roney to *Wallace & Co.*—8 Sept.—I have yours of date, with enclosure from Messrs. *Broadwood, Jones, & Co.*, but I do not think the price asked is too much for the ship: it is rather over £12 per ton; but as I am anxious to sell I would take £3500 for her. Could they not get their friends to inspect the ship, and then give an offer if they think £3600 too high a figure. If it was anything like the thing I would accept it to get clear of her although it was lower than £3500.

Wallace & Co. to *Broadwood, Jones, & Co.*, 11 Sept. 1879.—We are favoured with yours of yesterday *re Roney's* ship. We know you will do your best in this matter. We have a personal interest in it, as we are under considerable advances to Mr. *Roney* against this vessel, and we want to realise and he wants to retire from shipbuilding; so if your correspondents are *bonâ fide* inquirers, kindly do what you can to hurry them on judiciously.

There was also produced receipts for the sums amounting in all to £2550, paid by *Wallace & Co.* to *Roney*. They were worded as follows:

Received by me from Messrs. *John Wallace & Co.*, iron merchants, *Dundee*, the sum of to account of the purchase price payable by them for the three-masted schooner No. 2, presently building by me for them in my yard at *Arbroath* under contract between me and them.

Shortly after the date of the letter of the 11th of September, 1879, *Roney* did succeed in selling the vessel to Messrs. *Thorn & Cameron* of *Glasgow*, at the price of £2950. Owing to *Roney's* difficulties, which in a few weeks resulted in his sequestration, he was unable to complete his bargain, and Messrs. *Thorn & Cameron* on the 21st of April, 1880, rescinded the contract.

The Lord Ordinary (1) decided in favour of the Appellant, and by interlocutor dated the 23rd of November, 1880, granted the interdict as craved. But the Lords of the Second Division, 7th of January, 1881, recalled the interlocutor of the Lord Ordinary, and repelled the reasons of suspension (2).

On appeal,

July 26, 27. *The Solicitor-General for Scotland* (Mr. *J. B.*

(1) Lord *Rutherfurd Clark.*
(2) Court of Sess. Cases, 4th Series, vol. viii. p. 360.

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Balfour, Q.C.), and Mr. *Benjamin*, Q.C., contended for the Appellant that the whole actings and transactions shewed this was merely an attempt to constitute a security arrangement, and not a true sale. If a purchase the cross transaction of bills for cash would not have been carried out, nor would the vessel have been left in *Roney's* complete control. At the most there was here a sale with a simultaneous agreement with the written contract that it should be a security. But whether the transaction was a contract of sale or one merely of security, not having been followed by delivery, it was not effectual to transfer the property, for by the law of *Scotland*, which differed from the law of *England*, the property of the thing sold remains with the seller till delivery, though the price should be paid: *Stair*, Inst. 1, 14, 2; *Ersk.* Inst. 3, 3, 2; 1 *Bell's* Comm. (7th ed.), pp. 171, 181; *Salter* v. *Knox* (1); *Mathison* v. *Alison* (2); *McArthur* v. *Brown* (3); see as to securities over moveables, 1 *Bell's* Comm. (7th ed.), p. 273; *Boigs* v. *Watson* (4); *Anderson* v. *M'Call* (5).

The Respondents relied on *Simpson* v. *Duncanson's Creditors* (6),

(1) Mor. 14,202.

(2) Court of Sess. Cases, 2nd Series, vol. xvii. p. 274.

(3) Ibid. vol. xx. p. 1232.

(4) Mor. 11,587.

(5) Court of Sess. Cases, 3rd Series, vol. iv. p. 765.

(6) The report, as reported by Lord *Monboddo* in *Morison*, August 2, 1786, 14,204, is as follows:—

Simpson employed *Duncanson* to build a ship for him.

The materials composing the hull were to be provided by the builder; but the employer was to furnish the masts and other articles necessary for completing the vessel, and the price was to be paid in three different portions, one at laying the keel; another, when the vessel was built up and planked to the top of the gunwale; and the remaining sums when the ship was launched.

After receiving payment of the first portion, *Duncanson*, the shipbuilder, became insolvent. The factor on his sequestrated estate insisted that the ship in its then imperfect state was to be viewed as still the property of the bankrupt, the proceeds of which were to be divided among his creditors in general.

Mr. *Simpson* on the other hand contended that by the construction of the vessel in the terms of the contract, it became his, *specificatione*; the builder being to be considered merely as a mandatory who acquired, not for himself, but to his constituent.

The determination of the case was thought by the Judges to depend, not so much on general principles of law as on the special terms of the agreement. By these the employer was to pay the price in different portions. Before payment, however, he had a right to see the work so far properly performed. Thus as the builder proceeded such an appropriation took place, as prevented his creditors from

but there the payment was to be by instalments as the ship attained certain specific stages of building, and that case was decided not so much upon general principles as upon the particular terms of the contract: see also opinion there of Lord Justice Clerk *McQueen*.

The *Mercantile Law Amendment (Scotland) Act*, sect. 1, did not apply (1.) because there was, in reality, no contract of sale; (2.) that section only applied to a real sale of a specific article ready for delivery and completed; and (3.) it did not apply where the goods are left in the seller's custody at his order and disposition. And none of the Judges in the Court below put any weight upon the statute. In *Sim* v. *Grant* (1) it was held that this section did not apply to a transaction or sale, under which the subject sold (a horse) remained undelivered, and the seller not only had the custody, but continued in use and possession of it, with power to sell: see also *Edmond* v. *Mowat* (2). Those cases applied here, where *Roney*, the seller, beyond question had been left with more than the naked custody; and with the power to sell for his own benefit, at least to the value over the advances.

[LORD BLACKBURN:—In *Sim* v. *Grant* (1) the Lord President *Inglis*, after stating the facts, said: "That was a state of posses-

attaching the ship without refunding the sums advanced.

The Lords found the claim of Mr. *Simpson* to be preferable to that of the creditors of the bankrupt.

The report of the case in *Bell's* Comm. 7th ed. p. 189, after giving the facts, continues:—

"The Court held *Simpson* to be the proprietor in consequence of the particular nature of the bargain and the appropriation of the vessel from the time of laying the keel.

"Lord Justice Clerk *M'Queen* said, that, taken upon general principles, it was a nice question; but he thought the special nature and terms of the contract should decide it. In the case of a simple bargain for the building of a ship, the materials to be furnished by the builder, he would incline to the opinion that the unfinished vessel belonged to the builder or his creditors; but in the particular case when, by the contract, one third of the price was to be paid when the keel was laid, another when the building was advanced, he held that there was an appropriation of the vessel to the employer from the time of laying the keel. In this opinion Lord *Eskgrove* concurred. The rest of the Court went chiefly on the ground that the creditors of *Duncanson*, taking the benefit of the contract, could not refuse credit for the payments which had been made to *Duncanson* himself."

(1) Court of Sess. Cases, 2nd Series, vol. xxiv. p. 1033.

(2) Court of Sess. Cases, 3rd Series, vol. vii. p. 59.

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sion inconsistent with the personal contract of sale," and that was exactly what was decided in *Twyne's Case* (1).]

Here *Roney* was, at the time of his sequestration, the reputed owner of the vessel. In the Respondents' letters to him and to shipbroker, the ship was called and treated as *Roney's* ship, and left at his order and disposal, and this acting led people to believe, and justly believe, that it belonged to him.

If it was held that the judgment below was right, and then, on the minor point, that they had a right to any surplus over the advances for which the vessel was sold, the interlocutor of the Second Division ought to be so varied as to give them that right.

Mr. *Charles*, Q.C., and Mr. *Vary Campbell*, maintained, for the Respondents, this was an ordinary contract of sale, which the Appellant did not challenge on the ground of fraud or as in view of the impending bankruptcy. The price set out in the contract was paid by cheques. These were none the less payments because the Respondents received accommodation bills of like amounts.

They relied on *Simpson* v. *Duncanson* (2); since that case there was no doubt that the transference of the property of a ship in the course of being built was an exception to the general rule of Scotch law requiring delivery in order to pass the property upon a sale. The only difference between this and that case was that there the instalments—which were only of importance as fixing the identity of the particular vessel sold—were to be paid at a fixed period. In *Orr's Trustee* v. *Tullis* (3) Lord *Neaves* said: Upon payment of the instalments of the price, there passed so much of the ship as was then made: see also *Bell's* Comm. (7th ed.), 187 to 189; *Bell's* Prin. sects. 1033, 1328; and *M'Meekin* v. *Ross* (4).

But the 1st section of the *Mercantile Law Amendment (Scotland) Act* was conclusive as against the Appellant. The legal effect of the transference of the property to the Respondents could not be lost by any plea of reputed ownership. The true owner might be barred from vindicating his property if he had acted collusively,

(1) 3 Co. 80; *Chitty* on Contracts, 11th ed. p. 384.

(2) Mor. 14,204; Bell's Com. 7th ed. p. 189.

(3) Court of Sess. Cases, 3rd Series, vol. viii. p. 936.

(4) Court of Sess. Cases, 4th Series, vol. iv. p. 154.

or, without reasonable cause arising in the ordinary course of business, held out the bankrupt, or allowed him to appear, as the owner, and has thereby misled third parties exercising ordinary care to their loss and damage: *Orr* v. *Tullis* (1); *Anderson* v. *Buchanan* (2); and 1 *Bell's* Comm. (7th ed.) 270. Here there was nothing in the evidence which shewed that *Roney* was allowed to deal with the vessel as his own, or that he was represented as the unincumbered owner. It was impossible to regard leaving the vessel in the builder's hands in any degree collusive or out of the ordinary course of business. In *Holderness* v. *Rankin* (3), Lord Justice *Turner* observed, "The world has no right whatever to assume that every ship in a shipbuilder's yard is his own. The contrary is perfectly notorious. Shipbuilders very rarely build for themselves—they build for others under order given to them": see also *Master* v. *Ker* (4). *Sim* v. *Grant* (5) was quite distinct—there it was held that the seller had the custody of the horse under conditions which were quite inconsistent with a contract of sale.

Apart from the written contract, the case against them was not strengthened by looking at—if it could be looked at—the parole evidence. *Roney* wanted advances upon the vessel; the Respondents were advised that the only form the transaction could take must be one of sale; this was explained to *Roney*, and he deliberately agreed to sell the vessel. The original agreement was recorded in a memorandum of sale; a back-letter, or separate qualifying agreement, prohibiting an absolute transference of the proprietary in some of its effects to a security, was refused. The whole sum was advanced to *Roney* without any deduction, and he gave receipts which acknowledged that the price had been given and received in payment of the price of the vessel.

The legal position of the Respondents is as absolute disponees; although, without prejudice to any equities, the Appellant may have hereafter to establish against them to an account for any surplus over the advances which they may make out of the sale

(1) Court of Sess. Cases, 3rd Series, vol. viii. p. 936.
(2) Court of Sess. Cases, 2nd Series, vol. xi. p. 270.
(3) 29 L. J. (Ch.) 753, at p. 759.
(4) Court of Sess. Cases, 4th Series, vol. vi. p. 898.
(5) Court of Sess. Cases, 2nd Series, vol. xxiv. p. 1033.

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of the vessel; but the question as to these equities could not arise as long as the Respondents are kept out of their property and the money.

The *Solicitor-General* in reply.

The Lords delivered judgment as follows:—

Lord Selborne, L.C.:—

My Lords, your Lordships have listened to lengthened arguments in this case, but it appears to me that there are really only two questions which are ultimately material to the judgment. The first is, whether this is a contract of sale. Now, the Appellant is under very great difficulties when he denies that it is a contract of sale, because upon the face of the instrument it is as carefully prepared and clearly expressed a contract of sale as anything can possibly be. And when we turn to the parole evidence, although no doubt on the one side and on the other there is a contrariety of statement, yet the purchasers (the Respondents) most positively say that what is expressed in the instrument is that which was intended. It was done no doubt with the motive of securing the money which the purchasers had at stake, but it was done deliberately by way of purchase, because that was the best and most effectual way of accomplishing the object which the parties had in view. In corroboration of that, if corroboration were necessary, we find that the preliminary heads of the agreement, afterwards extended by this contract, begin, "Memorandum for contract of sale and building contract;" and, if they could properly be looked to, the entries in the book of the law agent are to the same effect. The statement on the other side is absolutely inconsistent with what appears upon the face of the instrument, and there is no reduction of the instrument asked for. It is not an allegation of something consistent with the instrument; it is an allegation entirely destructive of it. Therefore, as it appears to me, my Lords, the first point must be decided, in accordance with the instrument, that this was a sale, whatever may have been the motive, reason, and purpose which led to that sale; and its *bona fides* is really not in dispute.

My Lords, I think I may under those circumstances pass very

lightly over what was afterwards written and done. There was a course of action upon this contract shewing, as I think, a clear intention to adhere to it; because certain cheques were from time to time drawn, by the persons who under the contract are technically at all events purchasers, for the whole amount of the agreed purchase-money, namely, £2500, and £50 further, which represents, as I understand, certain extra work done upon the ship. The fact that those were payments of purchase-money under the contract is evidenced by a series of documents signed, as often as any of those payments were made, expressly stating that they were "to account of the purchase price," payable by the purchasers for the ship in question, and these documents are all subscribed by *Roney*, who was, on the face of the contract, the seller. It is said that those payments are not to be regarded as real payments, because, not for all of them, but for all except £120 in the whole, there were acceptances given at the same time by *Roney* who received the money. But it seems to me to be perfectly clear that the object of those acceptances was simply to keep the purchasers out of cash advances until the period of time at which, if those payments had not been made, the purchase-money would have been payable under the contract. Looking to this appropriation of payments made by the receipts for the cheques, it appears to me to be an irresistible conclusion that as between *Roney* and the purchasers, the purchasers, and not *Roney*, were liable and bound to take up those bills; as in point of fact they did, although not as far as I know till after the sequestration. In that state of things, those bills having been taken up, the money has in fact been paid by the purchasers, and to the full amount.

My Lords, I cannot but observe that, whatever may have been the intentions of the parties with regard to any ulterior arrangements or settlements between them, I find nothing to lead me to the conclusion that those intentions extended so far as in any event whatever to pay, or repay, the £2550 to the purchasers, otherwise than by means of the realization of the property purchased. Personal debt, independent of this contract, I do not find to have resulted from the transaction between the parties. What is alleged is this—and there is undoubtedly some evidence in sup-

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port of it—that the parties contemplated that the purchasers would realize this ship by sale, but that having originally gone into the transaction in a certain sense with a view to their own security, and evidently not having fixed the £2500 as a price in the ordinary way of bargain where the motive is to become possessed of and to retain the article purchased, the purchasers would not, if the article when sold fetched more than that amount, and any interest, costs, and so on which might be due, take advantage of any gain or profit, which, according to the letter of the contract, they might possibly be able to realize.

My Lords, I cannot say that I find in this evidence any very clear or satisfactory proof of a positive agreement having been at any time made for that purpose, although I do find something sufficient to shew that there was a sense of moral obligation, at all events on the part of the purchasers, so to act, and that it was their apparent intention so to act. It may be that what happened between them may raise that, beyond moral obligation, into a legal or equitable obligation, which the Courts would enforce; and that certainly, I think, appears to have been the opinion of the learned Judges in the Court below. I will assume, for the present purpose, that there might be sufficient grounds for that conclusion, but at the most it can come to nothing more than this—that this being in intention expressly a contract of sale, there is a bye-agreement, a collateral agreement, not in the form of a regular back bond, but of that nature, by reason of which, when the property purchased is realized by a subsequent sale, something will be done between the parties to adjust the mutual rights or equities which they have consented to establish between them. That appears to me not only not to destroy the sale as a sale, but really to proceed upon the contract as its foundation and basis, and to be something growing out of that contract which the parties, according to the hypothesis, agreed to do. Therefore, it appears to me that there is no ground whatever for treating this otherwise than as a sale.

I postpone the consideration of the correspondence which passed with a view to the subsequent sale or re-sale of this property, because that seems to connect itself naturally with another argu-

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ment on the question of reputed ownership. Postponing that, I have first very lightly to pass over the argument founded upon the Scotch law as laid down in the case of *Simpson* v. *Duncanson* (1), or supposed to be laid down in that case, independently of the *Mercantile Law Amendment Act*. I frankly confess that unless *Duncanson's* case is to be explained, as it was put at the Bar, upon the footing of a constructive delivery, I do not very distinctly or clearly understand what the law is which that case decided: it is admitted to be exceptional. Upon the face of the decision itself, as reported by Lord *Monboddo*, it seems, it was not that the property in the ship had vested, but that there was an obligation on the part of the trustee or assignee in bankruptcy, taking the property, to repay the money which had been laid out upon it; which is a very different thing. But, put it as you will, the case of *Simpson* v. *Duncanson* (1) does not appear to me to be an authority on which it is so satisfactory to rest the decision of the question now before your Lordships, as it is to rest it upon the terms of the *Mercantile Law Amendment* (*Scotland*) *Act*, which render a consideration of the difficulties which might have arisen in regard to *Duncanson's* case now immaterial.

By the general law of *Scotland* there must be tradition, or delivery, in order to give effect to a contract of sale; but by the *Mercantile Law Amendment Act*, for the express purpose of assimilating the law of *Scotland*, on such points, to the law of *England*, it is provided that where goods have been sold but have not been delivered to the purchaser, but have been allowed to remain in the custody of the seller, the mere want of delivery shall not enable the creditors in bankruptcy of the seller to defeat the sale. I have already said that, in my opinion, whether in some sense security was the object or not, there was here a sale in fact and in intent. The statute does not say that, there being a sale, that is to be taken out of the operation of the statute, because the parties may have some further contract or agreement, or understanding *inter se*, with regard to the subject of the sale. This is a case in which, if there was a sale at all, there was a sale unaccompanied with a delivery to the purchasers. The subject was allowed to remain in the custody of the seller. Every condition of this

(1) Mor. Dict. 14,204; also Bell Com. 7th ed. vol. i. p. 189.

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statute was fulfilled, and I cannot see any ground upon which your Lordships can qualify those conditions of the statute for the purpose of defeating a *bonâ fide* transaction which is otherwise lawful. It appears to me, therefore, that the statute removes all the difficulties and questions which might otherwise have arisen as to the doctrine of *Simpson* v. *Duncanson* (1), and that, having regard to that clause of the statute, the conclusion arrived at by the Court of Session is correct, the only difficulty upon that point being that the Court of Session have not based their conclusion upon the statute as distinctly as I think your Lordships will be disposed to do.

With regard to reputed ownership, I really think it is very far from necessary to say much, because beyond all question what Lord Justice *Turner* said in the case of *Holderness* v. *Rankin* (2) is true, that the fact of an unfinished ship being in a shipbuilder's yard is not enough by itself to raise a reputation of ownership on the part of the shipbuilder. I see nothing to distinguish this particular case from the ordinary one. If, in point of fact, this ship was not, after the sale, the property of the shipbuilders, the mere fact of its remaining in their yard unfinished could not create the reputation of its being so; and whether or no it was left at their order and disposition for the purpose of creating a reputation of ownership, and to enable them to deal with it in a way which would bring it within the scope of the bankruptcy law, is a question to be determined upon the evidence: and I can see no evidence whatever in support of that proposition.

All that is referred to in support of it is a correspondence, shewing plainly enough that communications passed from time to time between the shipbuilder in whose yard this vessel was, and those whom I have called the purchasers, and also the brokers; and latterly, with one intending purchaser. That correspondence taken as a whole (and every part of it is consistent with the rest) shews plainly, that it was intended and desired to find a purchaser for this unfinished vessel. References were made in the correspondence to the builder, but that would happen in the ordinary course of things if the person to whom the vessel belonged desired

(1) Mor. Dict. 14,204; also Bell Com. 7th ed. vol. i. p. 189.
(2) 29 L. J. (Ch.) 753.

that it should be sold, whether it belonged to the builder, and whether it could be sold without his concurrence or not. Nothing was done or said from which I should infer that there was any authority which would have enabled him to deal with it without the concurrence and consent of the Respondents. Their interest is several times referred to, and referred to in a manner which appears to me to be perfectly consistent with the absence of any reputation of ownership in the builder, or any intention to create it. No doubt, my Lords, in those letters the ship is frequently spoken of as the builder's ship; but the letters are not written to persons who are induced by their means to deal with the ship upon the footing of its being the property of the builder. They are not published to the world. Nothing appears to have happened with regard to these letters out of which a reputation of ownership could grow. Therefore, my Lords, it appears to me that there is nothing in that argument.

The last point that was mentioned, about the notice extending to the use of the building yard, may be said now to be at rest. It is admitted on all hands that such use as is necessary to enable the ship to be taken away, is proper and not in dispute. On the other hand, any indefinite use of the building yard your Lordships do not understand to be claimed, and certainly if it were claimed it would receive no countenance from anything which your Lordships are likely to say.

There remains only the question whether any addition should be made to the interlocutor refusing the interdict. Now the interdict is simply sought for to prevent those things from being done according to the notice which are authorized by the contract, and necessary to enable possession to be taken of the ship, and the ship to be sold; and such use, as I have already said, to be made of the building yard as is absolutely necessary and indispensable. The interdict seeks to prevent that, and the question is, is it according to contract or not? If the contract is good, as I think your Lordships will hold it to be, those things appear to me to be authorized by the contract; and to refuse an interdict which would prohibit them, appears to me to be a necessary consequence. If your Lordships are of that opinion, it appears to me that to go further, and to enter into the question of the ulterior rights of the

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parties under any collateral agreement which may exist between them, would not only not be necessary to protect any rights which may exist under such an agreement, but in the present state of the evidence, I think your Lordships have not the materials upon which it would be possible or satisfactory to make any such declaration or right to attempt it.

On the whole my opinion is that the judgment under appeal is right, and I move your Lordships that the interlocutor be affirmed and the appeal dismissed with costs.

Lord Blackburn:—

My Lords, I am entirely of the same opinion.

It seems to me that it will be most convenient to consider first the true effect and construction of the *Mercantile Law Amendment (Scotland) Act*, 19 & 20 Vict. c. 60, s. 1. Now there is a preamble to that Act explaining what the object of it is, and there is a similar preamble explaining the object of another Act, for there was one passed for *England* and one for *Scotland* in the same year. The object of the two Acts was this:—They were passed because there was a difference between the mercantile law of *England* and the mercantile law of *Scotland* which was found inconvenient in practice, and therefore it was desired to assimilate them in certain respects;—in some respects, doubtless, by making the English law similar to the Scotch, and in other respects by making the Scotch law similar to the English. It is therefore almost as important in construing that Act to know what was the English law as to know what was the Scotch law, and I believe that upon neither is there any real dispute.

By the English law when there was what civilians would call *emptio perfecta*, and what English lawyers call a bargain and sale,—a contract for good and valuable consideration to pass the property in particular chattels,—as soon as that was ascertained the property did pass, and the purchaser, although he might not be entitled to delivery, for there might be a vendor's lien or something else to prevent delivery, was entitled nevertheless to the property in the goods, to the *jus in re* as well as to the *jus ad rem*. That made a very considerable practical difference between the law of *England* and the law of *Scotland*, for the law of *Scotland*

was like the civil law upon which it was founded, the maxim of the civil law being *traditionibus et usucapionibus non nudis pactis transferunter rerum dominia.* When there was not an actual delivery,—however complete the contract might be, although it was *emptio perfecta* to the fullest extent, amounting to all that in the great chapter of the Digest upon that subject has been considered to be *emptio perfecta,* and although every farthing of the price was paid,—yet the *dominium rei,* the *jus in re,* did not pass to the purchaser. Although he had the *jus ad rem,* and could, as long as the vendor was *sui juris,* compel the vendor to deliver to him the goods, he had not the *jus in re.* The practical result of that was that a creditor in *Scotland* might issue diligence and seize the goods, as still the goods of the vendor, that is to say, of the person who had sold them, although every farthing of the price had been paid; and further than that, if a sequestration had taken place, the vendor having become a bankrupt, the property passed to the sequestrators, and they were entitled to hold it, leaving the man who had perhaps paid every farthing of the price, to prove against the estate. That was the state of the law in *Scotland,* and it is obvious that there was a very considerable difference in the practical working of the English law and the Scotch. If a man purchased a quantity of goods, one half of which lay at *Greenock* and the other half at *Liverpool,* the creditors of the vendor might seize the goods in *Greenock,* but no creditor could touch the goods in *Liverpool.* In the case of a sequestration in *Scotland,* the sequestrator could take the goods in *Greenock,* but in the case of a bankruptcy in *England,* the assignees in bankruptcy could not touch the goods in *Liverpool.*

Those were the differences between the laws of the two countries.

Then comes the Act of Parliament for the purpose of assimilating the two laws, and it says this:—"Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing

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the delivery of the same." Now I quite agree that that does not say that a contract of sale, *perfecta emptio*, in *Scotland* shall pass the property—shall pass the *jus in re*—and so far it does not assimilate it to the English law at all. The chief practical difference between the *jus in re* remaining in the vendor and the *jus ad rem* going to the purchaser, was that his creditors by poinding and by sequestration could take the goods; there is a nominal difference now between the law of *England* and the law of *Scotland* as regards this. But for all practical purposes the law of *Scotland*, where there has been a contract of sale, though no delivery, is made identical with the law of *England* in the actual result.

Now, my Lords, an argument has been based upon the words of the Act "where goods have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller." An attempt has been made to give a meaning to those words in which I cannot agree. I think that when you take the existing law of *England* and *Scotland*, as I have mentioned, and see what was the object of the Legislature in using these words, it is plain that they could not have intended by such words as these: "been allowed to remain in the custody of the seller," to introduce a new and complicated difference between the law of *England* and the law of *Scotland*. It is perfectly true, I think, as regards the law of *Scotland*, and it is to some extent true also as regards the law of *England*, that, independent of bankruptcy and before there is bankruptcy at all, where one person has allowed another to have possession of goods under such circumstances, and in such a way as to accredit that other person, and entitle him to sell them, or to acquire credit upon them,—if the true owner has allowed this to take place,—he should be responsible for the consequences, and it would be unjust for him to take away the goods to the damage of those who may, in consequence of his having accredited the other person, have acquired a right over them; though before there has been bankruptcy. In *England* when there has been bankruptcy this principle has been now for a very very long time carried out by force of a statute which we need not now consider, because it is not under the English statute of bankruptcy at all that the question now arises.

In *Scotland*, I understand that something very similar to the principle I have mentioned exists, but it is not made by statute applicable to sequestration, or to a case where the party has failed, but it rests upon the grounds of Common Law. A simple creditor who issues process and poinds the goods might at Common Law poind them as against the person who has sold the goods, if that person retained the *jus in re*, though he had lost the *jus ad rem*; notwithstanding the statute he may poind them as a creditor where the possession of the vendor (to borrow the phrase used by Lord Justice Clerk *Inglis* in the case of *Sim* v. *Grant* (1)), has been allowed by the purchaser to be such as is quite inconsistent with his having the *jus ad rem* by virtue of his personal contract of sale. It is very true that inasmuch as the purchaser had, by the Common Law of *Scotland* before this Act was passed, got the legal right to the property, you could not properly say that he was "the reputed owner" of goods of which he was the actual owner himself. But the same principle which would have made a third person become the reputed owner, so as to give a creditor a right to seize them in his possession because the true owner had allowed them to be in his possession, appears to me to apply when you are applying the statute. If you can shew that the man who had acquired the *jus ad rem* has allowed the vendor to keep possession of the goods in such a way as is quite inconsistent with the *jus ad rem*, it seems very reasonable indeed to say that that shall be considered as analogous to a case of reputed ownership, and, that being so, the *Mercantile Law* (*Scotland*) *Amendment Act* does not take the goods out of it. It says that delivery shall be good to make a contract of sale pass the property as against creditors, but it does not say that, without delivery, the property shall pass where, if there had been delivery and the goods had been left in this particular way with the vendor afterwards, they would have been made liable to the diligence of his creditors. So far, I think, the argument is quite right, but it is inapplicable to the present case. The effect of the contract of sale upon the goods with reference to the diligence of creditors is made exactly the same as if there had been an actual delivery: and as it would be under the English law.

(1) Court of Sess. Cas. 2nd Series, vol. xxiv. p. 1033.

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It has been endeavoured to be argued that if there was here, by the side of the contract of sale, a collateral agreement that the ship should be only held as security, that would prevent the contract of sale operating under the *Mercantile Law Amendment Act* so as to require no delivery to prevent any diligence or sequestration. I cannot agree with that argument at all. I do not think that the point exactly arises here. I listened to the observations of the noble and learned Lord on the woolsack, and I agreed in the reasons which he gave. It seems to me that in this case, the contract of sale was agreed upon probably with the motive and intention that the party should thereby be able safely to make advances and have the security of the goods that had been sold to him; but whatever the motive and intention might be, it was as clear a contract of sale as anything could possibly be in its inception. I think that is perfectly plain. The evidence also leaves no doubt upon my mind that there was in this case a feeling of moral obligation on the part of Messrs. *Wallace* that if this ship should turn out to be worth much more than the £2500, they would not keep the surplus. I think that that is repeatedly recognised in the different letters which passed. My present idea would be that, although there was that moral obligation or honorary obligation, it never was reduced to a contract at all. The Solicitor-General says: If there was such a contract, when was it made, where was it made? from which he concludes that it must have existed *ab initio;* I think on the contrary that it may be concluded that it never existed at all. That would be my impression certainly, if I were going to decide it; but that was not the impression of the Court below, and it is not necessary to decide it. But supposing there was this completed collateral contract—not only an honorary contract, which I have no doubt that there was, but a binding, legal, and enforceable contract—that this should be a security, I do not see the slightest ground for saying that that undoes the effect of the *Mercantile Law Amendment Act,* which says that goods having been sold (as these were, although with a motive no doubt to produce this effect) as far as regards the rights of creditors of the vendor to prevent delivery of the goods either by sequestration or poinding, they shall have none, but the matter shall stand as it would

under the English law. That, I think, is the point that will be decided here.

Upon the rest of the case, my Lords, I think I need hardly say anything more. Supposing it to be the fact that there was a collateral contract of that sort, doubtless in the possible event of the ship proving to be worth more than the advances which have been made, it may be that it will come into operation. I expect, however, and I fear for the sake of both parties, that it will turn out that it never will come into operation, because the ship will never sell for so much as has been advanced in respect of it. But that we have nothing to do with. As to all the rest of the case, I think the interdict here is asked for against their fulfilling the very terms of the contract which they have made. The interdict would have the effect of preventing the purchaser from enforcing delivery of the ship. That is exactly what the *Mercantile Law Amendment Act* says shall not be done by the creditors of the seller by any process of law, including sequestration. It seems to me, therefore, that the interdict should be refused. And I do not see the slightest occasion for doing anything further; indeed, I think mischief would probably be done by declaring any rights or doing anything at all further. I quite agree in thinking that when there is a ship standing in a dockyard unfinished, as this was, the purchaser, if he has a right to the ship, must necessarily have a right to do what is necessary and proper for taking the ship out of that dockyard; and it is impossible to suppose that sequestration would prevent his doing it. I also agree that the parties neither claimed nor intended to claim any right to let the ship remain for two years in the dock and occupy the dock while it was being built. I do not think they claimed anything so unreasonable, and, consequently, I do not think it is necessary to say anything at all against their having such a claim. It seems to me that if they do make such a claim it must be left to the sequestrator, or the trustee, or the landlord of the dock (for I understand it is a leasehold) to take proper steps to eject them. It is not necessary now to say anything at all about it.

Therefore, my Lords, I quite agree that the interlocutor of the Court below is right, and that the appeal should be dismissed.

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Lord Watson:—

My Lords, I entirely concur in the view that your Lordships take upon this case.

I cannot doubt that the contract between these parties is in terms a contract of sale and nothing else. It is a binding contract reduced to writing, and I think it must, so far as it is not legitimately controlled by the terms of some other collateral contract, take effect between the two parties to it in terms as a contract of sale. I must confess that I very greatly doubt the competency of importing into the construction of that written contract a very great deal of the evidence that was taken in this case. It appears to me that a great deal of it consists of antecedent communings, which, according to the law of *Scotland*, can have no effect whatever in indicating what is to be the true construction of the concluded contract in which the parties embodied their stipulations in writing. The very purpose of reducing them to writing was to get rid of all the doubt and perplexity that would arise as to the terms of the contract, if it had been left to stand upon the antecedent negotiations which had taken place, whether orally or by letter. But, my Lords, there is evidence as to the actings of the parties under the contract, as to their writings when the contract was in course, I may say, of execution; and those might, according to my view of the law of evidence in *Scotland*, be legitimately referred to as clearing up any point which might be doubtful. I cannot say that I find anything doubtful in this contract requiring elucidation from those sources, and upon looking to the correspondence and to the oral evidence, I can find nothing there which in the least degree conflicts with the construction which the contract, according to its own terms, ought in my opinion to receive.

Now the contention of the Appellant was twofold. He first maintained upon the evidence that he controlled the contract and imported a new meaning into the contract by the evidence which he had led. The Lord Ordinary seems to have given effect to that view, and to have held that the contract did not set forth the true agreement between the parties, that their agreement in reality was one for a loan upon security and not for a sale and purchase; and if that view were well-founded, the judgment of

the Lord Ordinary undoubtedly is equally so. But, my Lords, I find it impossible to accept that view, and I therefore turn to the alternative view which was presented in argument at the Bar. It was to this effect: that although in form this might be a contract of sale, it was in substance intended thereby to give a security only. That really resolves itself into an allegation that the motive of the parties in making the contract was to effect that which might more directly, had the circumstances of the case rendered it advisable, have been effected by a loan on the security of the vessel. But, my Lords, I cannot conceive that the contract is not to take effect according to its legal terms and legal meaning simply because it was intended thereby to give to the seller the benefits which they found it impracticable with safety to the purchaser to give him as a loan.

My Lords, the question raised in this case which I come to next (and I take it in this order, because it seems to me to be sufficient for the disposal of the case) is the question of the effect of the *Mercantile Law Amendment (Scotland) Act*, 1856. Now, my Lords, being of opinion that this is a pure contract for sale, I think it necessarily follows that, according to the law of *Scotland* as it stands, and as it stood, irrespective of the provisions of the *Mercantile Law Amendment Act*, it would have been valid as against the trustee in bankruptcy if it had been followed by actual tradition or delivery of the ship. I say nothing at present of constructive delivery as equivalent to actual, in a question with the trustee. That being so, what is the effect of the Act? It is necessary to consider for a moment in determining that question how the law stood at the date of the passing of that statute. At that time, by the law of *Scotland*, a purchaser who had merely a personal contract of sale, could not demand delivery from a trustee in a sequestration of the seller. It was in the option of the trustee to proceed against him by enforcement of the contract for delivery of the vessel and suing for the price. But the purchaser, on the other hand, who had not got delivery, had no right to compel implement in a question with the trustee. Now the statute was passed for the purpose of assimilating the law of *Scotland* to that of *England*. As I understand the law of *England*, a concluded contract of sale—what in *Scotland* is termed

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a concluded personal contract of sale—has the effect of passing the property or interest in the property of the goods sold to the purchaser. In *Scotland* it undoubtedly had not that effect, and in order to place a purchaser in *Scotland* in the same position as a purchaser in *England* in questions with creditors of a bankrupt or the assignees or trustee in sequestration of a bankrupt, the Legislature did not enact that in *Scotland* the completion of a personal contract should pass the property, or have the effect of delivery, but it did enact, by the 1st section of the statute of 1856, that as in a question with the creditors of the seller, or with the trustee in a sequestration of the seller, the purchaser under a personal contract of sale should have precisely the same right to enforce delivery of the goods sold as he would have had against the bankrupt had he remained solvent. That statute appears to me, my Lords, to supply all that is wanting to the completeness and efficacy of the contract in this case. Practically the effect of that section of the statute is to dispense with the necessity for delivery in the case of a purchaser who has a personal contract of sale. You have here a personal contract of sale, and you have here a statute dispensing with the necessity of actual delivery under it. That being so, I think we have, as your Lordships have already indicated, a satisfactory ground for deciding this case apart from all questions as to what the law of *Scotland* was before the Act was passed.

Now, my Lords, I do not think it necessary to say much upon the question of what the law of *Scotland* formerly was, because, seeing that the Act of 1856 is held by your Lordships to apply to this case, any question of what the law was before that statute was passed really possesses little more than an antiquarian interest. I think the question raised is a very difficult and a very doubtful one. I rather think there are authorities in the law of *Scotland* which come nearer to the case presented by the Respondents here than the case of which we have heard so much, namely, *Simpson* v. *Duncanson* (1). Many cases might have been found which would have supported the argument on the part of the Respondents with regard to the purchase of an article nearly completed, with instalments of the price paid up to a certain date, the

(1) Mor. Dict. 14,204; Bell's Com. 7th ed. vol. i. p. 189.

article left in the hands of the vendor for the purpose of completion, there remaining another instalment which would have to be paid for work at that time undone. I dismiss that, however, because it appears to be unnecessary for the purposes of this case to determine anything in regard to it.

But it was said that the Respondents in this case cannot have the benefit of the provisions of the *Mercantile Law Amendment (Scotland) Act*, because they have permitted Mr. *Roney*, the bankrupt, to deal with this vessel as if he were the owner of it (I dismiss the word "reputed" as not being very applicable to the case of a person in whom the legal estate is vested), and so to raise credit upon the faith of his being the true owner. Now, my Lords, without examining the doctrine of the law of *Scotland*, which certainly has rested, and was introduced, upon principles of equity, I think it is sufficiently clear that where a purchaser permits the seller to retain the goods and to deal with them as if they were his own, and as if no sale of them had actually taken place, he cannot have any claim to have those goods delivered to him, not as in a question with the seller of the goods, but as in a question with onerous creditors of the seller. But, in this case, whilst I admit that the principle contended for exists, and I believe it to be a sound principle, I cannot find the slightest ground of fact for holding that there has been any such holding out of himself as owner on the part of Mr. *Roney* in the present case, whether consented to by the Respondents or not. I entirely concur with the observations that were made upon this part of the evidence by the noble and learned Lord on the woolsack.

My Lords, the learned Judges in the Court below have indicated that in this case it is their view that a collateral contract was constituted of a nature which undoubtedly may co-exist with the contract of sale in question. I forbear to offer any opinion upon that point, because I cannot find any such case raised upon this record, and I do not think it desirable to indicate any opinion either for or against the Appellant upon that point. But if the Appellant has any such right, if he can instruct any such contract, I do not think his interest will be prejudiced by the form of the judgment pronounced in the Court below. No doubt the Appellant came into Court complaining of the whole terms of the notice

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which had been served upon him by the Respondents; but the mere fact of his complaining of the whole notice, and putting it all in his note of suspension and interdict, does not entitle him to object in this process to that notice upon all and every ground which he may discover. The very object of having a record is to limit the complainer (and especially in a summary proceeding like this) to those grounds of objection which are set forth upon the record. And here there is no allegation, as far as I can find, of any collateral contract, nor is there any allegation that he desires to have any reservation of his rights. He neither alleges that he has a right under a collateral contract, nor does he allege that that right has been invaded. It humbly appears to me, my Lords, that even under the notice it is quite possible for the Respondents in this case to proceed without doing anything to prejudice that collateral contract, if it exists; and the form of the record is such as not to prevent the Appellant, if he has good cause of complaint, from making that complaint and obtaining his appropriate remedy in a new and separate proceeding.

I therefore think that the judgment in the terms in which it was pronounced by the Lords of the Second Division ought to stand, as your Lordships have already proposed, as the judgment of this House.

Interlocutor appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 27th July, 1881.

Agent for Appellant: *A. Beveridge.*
Agents for Respondents: *Thomson, Son, & Brooks.*

[PRIVY COUNCIL.]

CHARLES PALMER . . . . . DEFENDANT;

AND

MARK HUTCHINSON . . . . . PLAINTIFF.

J. C.*
1881
June 30;
July 15.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Jurisdiction—Suit against Public Officer in his Official Capacity—Liability of Servants of the Crown—Petition of Right.

In a suit against Her Majesty's Deputy Commissary-General for *Natal*, and as such representing Her Majesty's Commissariat Department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of Defendant or his employés, and for general damage :—

Held, on exceptions by the Defendant to the jurisdiction of the Court and to the declaration, that the Defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the Commissariat Department; and that there was no cause of action against him.

The Government revenue cannot be reached by a suit against a public officer in his official capacity.

Quære, whether the Court would have had jurisdiction if a petition of right had been presented and the Crown had ordered that right should be done.

APPEAL from a judgment of the Supreme Court (Dec. 8, 1879), overruling the Appellant's exceptions to the jurisdiction of the Court and also his exceptions as set out in their Lordships' judgment to the declaration and action, except that the allegation No. 2 as to proceeding by petition of right was ordered to be struck out, and the exception No. 1 where it relates to the damages claimed for alleged tortious acts of officers of Her Majesty's service, was allowed.

The proceedings in the suit, and the material passages in the judgment of the Chief Justice, are set out in their Lordships' judgment.

* *Present* :—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

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The Attorney-General (Sir *H. James*, Q.C.), (with him, Mr. *A. L. Smith* and Mr. *Danckwerts*), for the Appellant, contended that the Supreme Court had no jurisdiction in the case. The object of the suit was to charge the Crown or its revenues or property (whether situated within or without the jurisdiction). That could not be done by the device of suing a servant of the Crown in his official capacity. There was no cause of action against the Appellant, and no liability incurred by him either in his personal or official capacity: *Sands* v. *Cooper* (1); *Gidley* v. *Lord Palmerston* (2); *Chitty* on the Prerogative [ed. 1820], pp. 31, 32; *Natal* Ordinances, No. 10, 1857. Redress against the sovereign cannot be obtained otherwise than by petition of right, nor can Crown property be taken in execution by ordinary process of law. Special legislation enables the Secretaries of State for *India* and for War, and the Postmaster-General, to be sued. Reference was made to *The Petitions of Right Act*, 1860, 23 & 24 Vict. c. 34, and *Blackstone*, bk. i. c. 7; the *Parlement Belge*, judgment of *Brett*, L.J. (3); *Cushing* v. *Dupuy* (4); *Feather* v. *Reg.* (5).

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a judgment of the Supreme Court of *Natal*, in a suit in which the Appellant was the Defendant. The suit was brought against him in his capacity, as described in the writ, as Her Majesty's Deputy Commissary-General for the Colony of *Natal*, and, as such, representing Her Majesty's Commissariat Department. In the declaration he is described as Deputy Commissary General in his capacity as Acting Commissary-General.

The suit was brought, as alleged in the writ, to recover,—

First, the sum of £743. 18*s.* 10½*d.* sterling, for the price or hire of certain waggons and oxen, and for carriage of certain goods.

Second, the sum of £1000 sterling, as and for damages, and as

(1) 3 Menzies, 566.
(2) 3 Brod. & B. 275.
(3) 5 P. D. 197.
(4) 5 App. Cas. 409.
(5) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

being the value of fifty trek oxen killed or dead owing to the over-driving and illegal acts of Defendant or his employés.

Third, the sum of £456 sterling as hire for certain six waggons and oxen, or as damages for their illegal seizure and impressment by Defendant or his employés; and,

Fourth, the sum of £250 sterling as general damages.

All upon grounds to be fully set forth in the declaration.

The grounds of the claim were more fully stated in the declaration, in which it was alleged that the first item of £743. 18*s*. 10½*d*. was due for the hire of certain waggons under a tender made by the Plaintiff, and accepted by the Defendant in his capacity as Acting Commissary-General, for seven waggons for the purpose of conveying Government stores, goods, packages of military stores, and other supplies from *Pietermaritzburg* to *Dundee* or *Doornberg*, and for the conveyance of certain extra or surplus goods, servants, and invalids as passengers in the said waggons. The other items were claimed as damages alleged to have been sustained by the Plaintiff in consequence of certain illegal and tortious acts committed by the Defendant and his employés, and for compensation alleged to be due under a promise made by Major-General *Marshall*, commanding the cavalry brigade, and the senior officer in the vicinity. The Plaintiff admitted by his declaration that the Defendant had tendered the sum of £1053. 18*s*. 10*d*., in lieu of all claims, the sum of £743. 18*s*. 10½*d*. being for the freight, and £310 for the rest of the Plaintiff's claim.

The Defendant, without answering the Plaintiff's declaration or entering into the merits of the case, excepted to the jurisdiction of the Court on the ground that the action was not cognizable by the Court, as being an action against Her Majesty's Commissariat Department for acts alleged to be done by officers in Her Majesty's service in performance of their duties in that service, and also upon the ground that the acts complained of were acts for which the Court could afford no remedy; and he also excepted to the declaration on the grounds that the Defendant, in the capacity in which he was sued, was an officer in Her Majesty's service acting under the instructions and directions of the Commander of the Forces in *South Africa*, and, through him, subject to the instructions and directions of the Secretary of State for War, and that

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the negligence and acts complained of, and the claims made under the alleged contract were acts and claims for which no legal remedy existed against Her Majesty's Commissariat Department, even if proceedings had been adopted in *England* by way of petition of right in due legal form instituted in the Supreme Court of Judicature in *England*, until the Secretary of State for War, as representing the said department of Her Majesty's Government, had had an opportunity of inquiring into and determining the merits of said claims and alleged wrongs complained of, and the relief, if any, which should be afforded, and of submitting the petition and his recommendations thereon to Her Majesty the Queen for Her Majesty's gracious consideration, and in order that Her Majesty, if she should think fit, might grant her fiat that right be done.

The Defendant also excepted to so much of the declaration as claimed damages for negligence, detention, or otherwise on the ground that such claims were bad in law and substance. And on the following grounds, viz.:—

1. "That they are preferred against a department of Her Majesty's Imperial service for alleged tortious acts of officers acting in the discharge of their duty, and when employed in the service of that department;

2. "That even if a claim for damages as instituted in the action were preferred in *England* on a petition of right, and submitted for the decision of the Supreme Court of Judicature in *England*, such claim would be disallowed."

The Court overruled the exceptions to the jurisdiction of the Court, and also those to the declaration, so far as it related to the form of suing and to the claims in respect of contract, whether made by the Commissariat Department or arising impliedly by reason of Major-General *Marshall's* orders or request; but they allowed the exceptions to the declaration so far as related to the damages in respect of *delicta* or tortious acts of any of the officers of the Queen's government.

In delivering his judgment, the learned Chief Justice said:—

"Her Majesty is not sued by name or title in this action, nor is she so sued in substance, any more than if the action were against the colonial revenue. A public officer under Her Majesty

(as public officers generally are) is sued in his official capacity on a contract in that capacity; and it appears to me that by the law or practice of this forum he may be so sued in ordinary course. It may be quite another matter whether he is liable on an implied contract, by reason of Major-General *Marshall's* order or request; but, possibly, evidence may shew that he is. As far, therefore, as by the exceptions it is objected that there is no jurisdiction in this Court to entertain the action, or that the declaration avers no regularly instituted cause of action, they must, I think, be overruled.

"But just as I am of opinion that the practice of our Court is to be applied to maintain this action, as far as relates to the form of suing, and to the suits being in respect of contract, so I also think, in accordance with the previous decisions by this Court (*Muirhead & Co.* v. *Ayliff*, 23rd of November, 1875, acted on in an *Estcourt* bridge case in 1879), that the revenue (be it *Natal* or English) is not liable for the alleged *delicta*, or, in English law phrase, the tortious acts of officers of the Queen's government. I can draw no distinction between one Queen's government and another in that respect: *Rogers* v. *Rajendro Dutt* (1)."

It is unnecessary to determine whether the Court would have had jurisdiction if a petition of right had been presented, and the Crown had ordered that right should be done. The suit was not a petition of right, and there was no order of Her Majesty that right should be done.

If the action had been against the Crown, either by name or title, or in substance, it is clear that the Court would have had no jurisdiction to entertain it.

The jurisdiction conferred upon the Court by the Ordinance of *Natal*, dated the 10th of July, 1857, was merely "over all Her Majesty's subjects, and all other persons whomsoever residing and being within the Colony."

The action is against a subject in his official character as Deputy Commissary-General. And it is further stated in the declaration that "the Defendant in his aforesaid capacity is the representative or head of the Commissariat Department in the

(1) 13 Moo. P. C. 209.

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Colony, and as such represents Her Majesty's Imperial Government in the Colony so far as the Commissariat and Transport Departments of the Imperial Government are concerned."

It is clear that the exceptions to the declaration ought to have been allowed upon the ground that the facts stated did not constitute a cause of action against the Defendant. It has never been contended by any one that the Defendant was personally liable upon the contract. If it had been, that contention must have failed.

The Supreme Court held that he was liable in his official character. It treated the action as a proceeding against the imperial revenue by making a public officer a Defendant in his official capacity, and expressed an opinion that a decree in such a suit might be executed against some portion at least of the revenue or property of the Imperial Government.

The Chief Justice said :—

"It is a common practice with us in South African Courts that actions for obtaining from the revenue money for or in respect of contracts are instituted against the proper public officer (generally the Colonial Secretary) in his official capacity, and judgment against him in that capacity is both sought and at times given. And in principle it seems to me that it has to be the same, as to our mode of procedure, whether the revenue sought by the action to be charged be colonial or English. The colonies are as much part of the Queen's dominions as *England* is, and for us to hold, as is contended for on the part of the Defendant, that to sue here the English revenue is to sue the Sovereign, but to sue colonial revenue is not, would be, I apprehend, to introduce a distinction practically and theoretically constitutionally unsound. I may mention here that our practice of proceeding against the revenue by making a public officer a Defendant in his official capacity was, *quoad* the *Cape Colony*, recognised apparently by the Privy Council as far back as the year 1838, in the case of *Van Rooyen* v. *Reit* (1), where the Civil Commissioner of *Uitenhage* (in the *Cape Colony*) was sued by private individuals in respect of a pecuniary default of his predecessor in office, in respect of moneys received by him from them. . . ."

(1) 2 Moo. P. C. 177.

In a subsequent part of his judgment, he said :—

"There is no occasion here to discuss the question as to how any judgment in this action can be put in execution, but I am disposed to think that the general rule is that a judgment obtained against a government officer in his official capacity may, by our practice, be executed against any government property found within this Court's jurisdiction, and not allocated by law to some distinct special purpose. We held, I think, several years ago, that certain property of the *Durban* municipality could not be taken in execution, by reason of its being thus otherwise allocated. There might, too, I presume, be cases in which the public officer sued did not sufficiently represent *in toto* the government for a judgment against him to bind all government property, even though not specially allocated."

The case of *Van Rooyen* v. *Reit* (1), cited by the Chief Justice, is no authority in support of the Plaintiff's right to sue the Deputy Commissary General. In that case it was held that the government officer who was sued was not liable, and the only right to sue the district secretary and treasurer which was recognised by the Judicial Committee was a right to sue him personally for money which by arrangement between him and *Swan*, of whom the Plaintiffs were the legal representatives, he had received on *Swan's* account.

In the case under appeal it was said by the Chief Justice, that the Crown is, "as to some branches of revenue, represented by public officers, and that then no petition of right seems to be requisite," and he referred to the case of the Attorney-General's proceeding by information, and to the case of *Dyke* v. *Elliott* (2), in which the Crown sued in the Admiralty Court, in the name of the Procurator-General, for the condemnation of a vessel for an offence against the *Foreign Enlistment Act*.

The Crown, by virtue of its prerogative, has a right to sue by information in the name of the Attorney-General, and also has a right to sue in the Admiralty Court in the name of the Procurator-General, but in the present case the Chief Justice treats the Plaintiff as attempting to sue the Imperial revenue by making a

(1) 2 Moo. P. C. 117. (2) 8 Moo. P. C. (N.S.) 428.

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public officer a Defendant in his official capacity. But this right of the Crown affords no support for the proposition that the Government revenue may be reached by a suit against a public officer in his official capacity.

The case of *Kirk* v. *The Queen* (1), which is cited by the Chief Justice, is no authority for that proposition. That was a suit by the Attorney-General against a contractor with the Secretary of State for War, praying for an injunction to restrain him from continuing upon land vested in the Secretary of State after notice to quit given under the powers of the contract. It seems to have been intimated that in such a suit the Secretary of State for War should be a party. That is, a party as Complainant, not as a Defendant.

Their Lordships are clearly of opinion that the Deputy Commissary-General cannot be sued either personally or in his official capacity upon a contract entered into by him on behalf of the Commissariat Department. He is not a corporation, and he has no property or assets in his official capacity which could be seized or attached in execution of a decree against him in that capacity, and it is clear that no portion of the Government revenue, whether allocated to a special purpose or not, could be seized in execution under it.

The law upon the subject has been clearly laid down in several cases.

In the case of *Macbeath* v. *Haldimund* (2), which was an action against the Governor of *Quebec* for military stores and supplies provided under his orders for the garrison of a fort, Lord *Mansfield* said, "The only question before the Court is, whether the Defendant be liable or not in this action. If he be, the Plaintiff must recover. If not, no consideration as to the Plaintiff's remedy against any other person can induce the Court to make him so. There is no colour to say that he is liable in his character of Commander-in-Chief. In a late case which was tried before me, where one *Savage* brought an action against Lord *North*, as First Lord of the Treasury, in order that he might be reimbursed the expenses which he had incurred in raising a regiment for the service of Government, I held that the action did not lie. So in

(1) Law Rep. 14 Eq. 558. (2) 1 T. R. 180.

another case of *Lutterloh* against *Halsey*, which was an action brought against the Defendant, who was a Commissary, for the supply of forage for the army, and by whom the Plaintiff had been employed in that service, the Commissary was held not liable. In the present case it was notorious that the Defendant did not *personally* contract. The Plaintiff knew, at the time that he furnished the stores, that they were for the use of Government; and he afterwards made Government debtor in his bills."

In the case of *Gidley* v. *Lord Palmerston* (1) it was held that an action would not lie against the Secretary at War for moneys which he, as a public officer, had received, and which he was authorized to pay over to the Plaintiff's testator, on account of his retiring allowance.

In that case Chief Justice *Dallas*, in delivering the judgment of the Court, said, "It is not pretended that the Defendant is to be charged in respect of any express undertaking or agreement between him and the testator, or in respect of any other character than his public and official character of Secretary at War. It is in that character and in that only that his duty is alleged to arise, being therefore a duty as between him and the Crown only, and not resulting from any relation to or employment by the Plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the Crown, subject only to the disposition or control of the Defendant as the agent or officer of the Crown, and responsible to the Crown for the due execution of the trust or duty so committed. There is therefore no duty from which the law can imply a promise to pay to the testator during his life, or to his executor after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the Crown, being received as the money of the Crown, and the party receiving it being responsible only to the Crown in his public character. On this view of the case it appears to us that this action cannot be maintained."

Any funds which may be issued by Government to the Commissariat Department for the service of the State stand upon the same footing as that above described with reference to the money received by the Secretary at War.

(1) 3 Brod. & B. 285.

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With reference to the remark of the Chief Justice that the case could be disposed of by having regard to the practice of the Court, the forum of the *locus contractûs* and of the action; their Lordships think it right to say that no practice of the Court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted.

For the above reasons their Lordships are of opinion that the exceptions to the whole declaration ought to have been allowed, and judgment given for the Defendant, with costs, and they will humbly advise her Majesty to allow the appeal, to reverse the judgment of the Supreme Court, and to order judgment to be entered for the Defendant, with costs. The Respondent must pay the costs of this appeal.

Solicitor for the Appellant: *Solicitor to the Treasury.*

[PRIVY COUNCIL.]

J. C.* 1881 *May* 19, 20.

WILLIAM BLACKBURN . . . . . PLAINTIFF;

AND

JOHN FLAVELLE . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Crown Lands Alienation Act, 1861, *s.* 13—*Lands forfeited to the Crown cannot be conditionally sold.*

Lands taken under a conditional sale and afterwards forfeited to the Crown are not open to a conditional purchase under sect. 13 of the *Crown Lands Alienation Act,* 1861. The Crown has, under the 18th section, the option either to sell them by public auction or to retain them in its own hands.

APPEAL from a judgment of the Supreme Court (March 25, 1880) discharging with costs a rule *nisi* obtained by the Appellant calling on the Respondent to shew cause why the verdict

* *Present:*—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD COUCH, and SIR JOHN MELLOR.

found for the Respondent should not be set aside and a new trial granted, or why a verdict should not be entered for the Appellant, with £5 damages and costs to be duly certified.

The action was brought in July, 1879, to recover damages for trespasses committed by the Respondent between the 13th of March, 1879, and the commencement of the action on certain land situate in the parish of *Berrembed*, in the county of *Bourke*, in the colony, to which the Appellant claimed to be entitled as conditional purchaser under the provisions of the Acts relating to the alienation of Crown lands in the colony of *New South Wales*.

The Respondent pleaded: 1, not guilty; 2, not possessed; and 3, that one *Arthur Albert Devlin* was entitled to the *locus in quo* as conditional purchaser under the provisions of the said Acts during all the time when the alleged trespasses were committed, and that he, the Respondent, entered on the land and committed the acts complained of by the leave and licence of the said *Arthur Albert Devlin*.

On these pleas issue was joined by the Appellant on the 13th of September, 1879.

The facts are stated in the judgment of their Lordships. The report of the case in the Court below will be found in *New South Wales*, L. R. vol. i. part 1.

On the 7th of October, 1879, a verdict by consent was entered for the Respondent, and on the 24th of November, 1879, the Appellant obtained a rule *nisi*, as above stated, pursuant to leave reserved, on the grounds that the land was in his lawful possession by virtue of the conditional sale to him, and that the land was not open to conditional sale when selected by *A. A. Devlin*, and that the land was never lawfully sold to him.

The Court (*Manning*, C.J., *Faucett* and *Windeyer*, JJ.) decided that the land could not be reselected before it had been declared forfeited, but reserved judgment on the question whether it could be subsequently.

By the final judgment it was unanimously held that, upon the true construction of the *Crown Lands Alienation Act*, 1861, a forfeited selection could not be reselected, but could only be disposed of by the Crown by auction, and therefore that as the

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Appellant's title failed, the verdict for the Respondent at the trial should stand and the rule be discharged, with costs.

Mr. *Wills*, Q.C., and Mr. *W. Wills*, for the Appellant, contended that he had a valid title to the *locus in quo*, and at the time of the trespass complained of was rightfully in possession thereof as conditional purchaser. Reference was made to the *Crown Lands Alienation Act*, 1861 (25 Vict. No. 1), ss. 3, 13, 18, 21, 23; to the amending Act of 1875 (39 Vict. No. 13), ss. 1, 2. There could be no lawful title vested in *Devlin*, for the earliest time at which there could have been default by *Woods* was on the expiry of three years and three months from the 13th of May, 1875, the date of his conditional purchase—*i.e.*, 13th of August, 1878—and consequently the Minister for Lands was right in regarding the conditional sale made by the land agent on the application of *Devlin* on the 8th of August, 1878, as absolutely null and inoperative. Besides, the Crown had shewn no intention of insisting upon the forfeiture, if any, by *Woods*, whose conditional interest in the land was voidable, not void. Then, as to the question whether, after *Woods'* forfeiture to the Crown, the latter could give title to his forfeited selection by conditional sale to the Appellant in March, 1879, or whether it was bound to sell the same, if at all, by public auction; sect. 13 of the Act of 1861 contains nothing to prevent such conditional sale. Sect. 18, on its true construction, provides that the Crown *may* sell forfeited selections by auction, not that it must. The effect of sects. 20–25 is to leave the option with the Crown either to sell by selection under sect. 13, or by auction under sect. 18: see 22 Vict. No. 12, s. 8. Reference was made to *Drinkwater* v. *Arthur* (1).

Mr. *Bompas*, Q.C., and Mr. *Leach*, for the Respondent, contended that according to the true construction of the Acts of 1861 and 1875, a forfeited or lapsed selection could not be reselected, and if sold, could only be sold by public auction. As pointed out in the judgment of the Court below, only one mode of sale was provided for forfeited selections. That was the literal interpretation of the Acts, and the reason and policy thereof favoured that con-

(1) 10 Supreme Court, N. S. W. 193.

struction. A reselection would afford no opportunity of compensation for improvements by the original selector. Moreover, if the land was capable of reselection, the sale to *Devlin* was valid. His claim was a valid one at the time that the Appellant made his selection, and the sale to the Appellant could only be by lot under sect. 13 of the Act of 1861. Reference was made to *Davenport* v. *The Queen* (1); *Attorney-General of Victoria* v. *Ettershank* (2).

Mr. *W. Wills* replied.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This case is a very important one, inasmuch as it appears from the statement of Mr. Justice *Faucett* that the titles of a great many persons may be affected by it. The learned Judges of the Supreme Court gave a very careful consideration to the case, and their Lordships have heard very able and elaborate arguments on both sides with regard to the construction to be put upon the *Alienation Act* of 1861. The question relates to a portion of the waste lands of the Crown in *New South Wales*, which, on the 13th of May, 1875, were conditionally purchased by *Henry Woods* under the 13th section of the Act, and were subsequently, on the 10th of October, 1878, declared to be forfeited. Mr. *Devlin* had, on the 8th of August, 1878, previously to the declaration of forfeiture, made an application for a conditional purchase of the lands. On the 13th of March, 1879, some considerable period after notice in the *Gazette* that the land had been forfeited, the Plaintiff, who is the Appellant, selected the land and applied to purchase it conditionally. The land agent refused to allow him to do so, upon the ground that Mr. *Devlin* had already made an application for the purchase of it. Upon the question being referred by the Plaintiff to the Minister for Lands, he, by letter of the 5th of April, 1879, directed the land agent to accept the Plaintiff's application as if made on the day on which it was originally tendered. This was accordingly done, and the deposit paid on the 15th of April, 1879. Mr. *Devlin* remained in possession. The

(1) 3 App. Cas. 115. (2) Law Rep. 6 P. C. 354.

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Plaintiff brought an action of trespass against him, and the question then arose whether lands taken under a conditional sale, and afterwards forfeited by the Crown, were open to a conditional purchase under sect. 13 of the Act, or whether by virtue of the 18th section they must not be sold, if at all, by public auction. That is the real question in the case. The Plaintiff had to make out his title; and if he failed, it was unnecessary to decide whether Mr. *Devlin* obtained a title by the conditional purchase on the 8th of August, 1878.

It had been decided as far back as 1879, in the case of *Drinkwater* v. *Arthur* (1), that under such circumstances the lands were not open to conditional sale under the 13th section. But, considering the importance of the case, the learned Judges thought it right to confer together, and to reconsider the decision in *Drinkwater* v. *Arthur* (1). Having done so, they unanimously came to the conclusion that that decision was correct, and that the lands were not open to a conditional sale.

Their Lordships have come to the conclusion that the decision of the Supreme Court was a correct one. The 13th section of the Act appears to make it compulsory upon the Government to sell conditionally, upon an application being made, any lands which do not fall within the exceptions mentioned in the earlier part of that section. The Act provides "That any person may, upon any land office day, tender to the land agent for the district a written application for the conditional purchase of any such lands, not less than 40 acres nor more than 320 acres, at the price of 20*s.* per acre, and may pay to such land agent a deposit of 25 per centum of the purchase-money thereof. And if no other like application and deposit for the same land be tendered at the same time, such person shall be declared the conditional purchaser thereof at the price aforesaid." Then there is a provision with regard to several applications being made at the same time. In this case no question arises under that.

The conditions upon which the land is sold are not specified in sect. 13, but by sect. 18 it is enacted:—"At the expiration of three years from the date of conditional purchase of any such land as aforesaid, or within three months thereafter, the balance of the

(1) 10 Supreme Court, N. S. W. 193.

purchase-money shall be tendered at the office of the Colonial Treasurer, together with a declaration by the conditional purchaser or his alienee, or some other person in the opinion of the minister competent in that behalf under the Act 9 Vict. number nine to the effect that improvements, as hereinbefore defined, have been made upon such land, specifying the nature, extent, and value of such improvements, and that such land has been from the date of occupation the *bonâ fide* residence either continuously of the original purchaser or of some alienee or successive alienees of his whole estate and interest therein, and that no such alienation has been made by any holder thereof until after the *bonâ fide* residence thereon of such holder for one whole year at the least." Upon his making that declaration, and upon payment of the balance of the purchase-money, he is entitled to have a conveyance in fee simple; but there is a clause at the end of sect. 18 that, "on default of a compliance with the requirements of this section,"—that is, in default of his having made the necessary improvements, and having resided according to the terms of the section,—"the land shall revert to Her Majesty, and be liable to be sold at auction, and the deposit shall be forfeited."

It was contended, on behalf of the Plaintiff, that the declaration that the land shall revert to Her Majesty authorizes the Crown to sell the lands so forfeited either by conditional sale or by auction, at the option of the Crown. But the section does not stop at the words "shall revert to Her Majesty." It proceeds to say that the land shall be liable to be sold at auction, and the deposit shall be forfeited. It was argued that the words "and be liable to be sold at auction" are not compulsory upon the Crown, but that it gives it an option, and sect. 20 of the Act was referred to. That relates to lands which are abandoned, and says that they shall "be declared forfeited by notice in the Government *Gazette*, and may then be sold at auction." Then a statute for the general interpretation of Acts was referred to for the purpose of shewing that the word "may" gives an option, and it was said that as sect. 20 says they may be sold, and gives an option to the Government, so the words "liable to be sold at auction" must be interpreted in the same way as "may then be sold at auction," and also gives an option to the Government.

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It is true that both the expressions "liable to be sold at auction" and "may be sold at auction" give an option to the Government, but the question is, what is the option? Is it an option to sell by auction or to sell by conditional sale, or an option to sell by auction or not to sell at all? That is the mode in which Sir *William Manning* very properly puts the case. He says: "I agree, indeed, that the words plainly import that the Crown has an option. But to do what? Surely to sell by auction or to withhold from such sale as the Crown may think fit. The alternative of sale by way of free selection in no way enters into the question, no trace of it being found in either the 18th or 20th clause; and, indeed, it is not too much to say that if that alternative were admitted, the option would not be with the Crown, but with the selectors, for when once the land is open to selection, a statutory right accrues to anyone to select the land." Their Lordships are of opinion that the view taken by Sir *William Manning* is the correct one, and that the option given to Government was to sell by auction or to retain it in their own hands.

A general rule of construction of Acts of Parliament is "*expressio unius est exclusio alterius.*"

Two modes of sale are referred to by the Act: one a conditional sale, the other a sale by auction; and according to the maxim above referred to, the 18th section, by expressly authorizing a sale by auction, excluded the right of conditional sale. That was the view taken by Mr. Justice *Hargrave* in the case of *Drinkwater* v. *Arthur* (1) to which the Court below referred. Mr. Justice *Faucett* in his judgment in this case quotes the following passage from Mr. Justice *Hargrave's* judgment in *Drinkwater* v. *Arthur* (1): "If there be any one rule of law clearer than another as to the construction of all statutes and all written instruments (as, for example, sales under powers in deeds and wills) it is this: that where the Legislature or the parties to any instrument have expressly authorized one or more particular modes of sale or other dealing with property, such expressions always exclude any other mode, except as specifically authorized." That appears to their Lordships to be a correct exposition of the law, and it is sub-

(1) 10 Supreme Court, N. S. W. 193.

stantially carrying out a principle similar to that expressed in the maxim *expressio unius est exclusio alterius.*

The construction that the option given to the Government was to sell by auction or not to sell at all, is a very reasonable one. If under the words "shall revert to Her Majesty" the forfeited lands should be held to have become subject to all the provisions of the Act to the same extent as they were previously to the conditional sale, then, as soon as the defaulter made default and the Government elected to treat the default as a forfeiture, any person might claim to purchase the land conditionally at the rate of 20s. an acre, whatever might be the value of the improvements. But if the Government are bound to sell by public auction or not to sell at all, then at least a month's notice must be given of the intended sale; so that every one may have an opportunity of purchasing, and the Government may get the real value of the land by competition. There would be no objection to the original defaulter's coming in and purchasing by auction with the competition of other persons, each bidding for the land according to his view of the value of it.

Again, if after forfeiture all the provisions of the Act apply to the forfeited land, the Government would be bound to sell it to the first applicant, and the defaulter would have a right to come in and purchase the land again conditionally on the original terms.

It should be observed that the Legislature could not have said that the Government must sell by auction without depriving the Government of the option of retaining the lands.

Their Lordships are of opinion that the Supreme Court came to a correct conclusion in holding that the Government were not bound to sell a forfeited selection, but that if they elected to sell they could only sell by auction. Their Lordships, therefore, will humbly recommend Her Majesty to affirm the decision of the Supreme Court. The Appellant must pay the costs of this appeal.

Solicitors for the Appellant: *Burton, Yeates, Hart, & Burton.*
Solicitors for the Respondent: *Parker & Co.*

[PRIVY COUNCIL.]

J. C.* 1881 *May* 20, 21.

GEORGE NAPIER TURNER . . . . . PLAINTIFF;

AND

WILLIAM WALSH . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Dedication of Land to Public Purposes by the Crown—Presumption from User—Crown Lands Alienation Act, 1861, *ss.* 3, 5—5 *&* 6 *Vict. c.* 36.

From long-continued user of a way by the public, whether land belongs to the Crown or to a private owner, dedication from the Crown or private owner, as the case may be, in the absence of anything to rebut the presumption may and ought to be presumed.

The same presumption from user should be made in the case of Crown lands in the colony of *New South Wales*, apart from the *Crown Lands Alienation Act*, 1861, though the nature of the user and the weight to be given to it vary in each particular case.

Assuming that the effect of the 3rd and 5th sections of the Act is that any dedication by the Crown must since 1861 be in manner prescribed by the statute:—

Held, that from a continuous user of twenty-one years before the statute, continued since 1861 down to the time of the action without any interruption or interference on the part of the Crown, a dedication prior to the statute, and at a time when the Crown had power to dedicate, might be presumed; and that that presumption was strengthened by the subsequent user.

5 & 6 Vict. c. 36, of the Imperial Parliament leaves the power of the Crown with regard to public roads as it existed by the common law, and does not interfere with its right to dedicate lands for that purpose.

APPEAL from a judgment of the Supreme Court (March 22, 1880) discharging with costs a rule *nisi* obtained by the Appellant calling on the Respondent to shew cause why the verdict in his favour should not be set aside, and a new trial had upon the ground of misdirection.

The question of law involved was, whether user may be relied on in the colony of *New South Wales* in like manner as it may be

* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR RICHARD COUCH, and SIR JOHN MELLOR.

in *England*, for the purpose of establishing as against the Crown a presumption of a dedication of a road over Crown lands.

The declaration alleged that the Respondent broke and entered the Appellant's land and cut down the fences on the land.

The material plea was one which justified the trespasses on the ground that there was a highway across the Appellant's land, that the fences obstructed the highway, and that the Respondent passed along the highway and cut down the fences to remove the obstruction.

To this plea the Appellant pleaded two replications, each of which stated that the alleged highway was a track across the Plaintiff's land, while the same was Crown land, and that such track was used by persons travelling with stock, for travelling and driving their stock on and along the same, but that such track was never proclaimed or dedicated as a highway, and was never a way otherwise than as aforesaid.

Issue was joined on these replications, and the action was tried by Mr. Justice *Hargrave* and a jury.

On the part of the Appellant evidence was given of the alleged trespasses by the Respondent, and a Crown grant to the Appellant of the land, dated the 1st of February, 1879, was put in. This Crown grant did not contain any reservation or exception of the alleged highway.

On the part of the Respondent "clear and distinct evidence of an uninterrupted and continuous user of the road in question" was given. It was shewn, according to *Hargrave*, J., that "for upwards of forty years the road fenced across by the Plaintiff had been constantly used by the public, by the police, by mail coaches, and by travellers in going up or down the *Lachlan* between *Enabalong* and *Condobolin*, and to numerous places, and that there was such a road to the knowledge of the Crown was amply proved by the production in evidence of the county map, which came out of the possession of the Crown, in which the road, though only specified as a track, was marked out."

Mr. Justice *Hargrave* directed the jury that user might be relied on in *New South Wales* as it might in *England* for the purpose of presuming and establishing dedication of a road over Crown lands as against the Crown, and that the user proved was sufficient to

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entitle the jury to presume dedication by the Crown of the road in question.

The jury found a verdict for the Respondent.

The Appellant obtained a rule *nisi* for a new trial, on the ground of misdirection; which the Supreme Court discharged with costs.

The Judges held, first, that the 2nd and 3rd sections of the Act 5 & 6 Vict. c. 36, did not bear on the question, as they related to alienations, whereas the acquiring of a right of way by user did not involve any alienation by the Crown; secondly, that the 3rd and 5th sections of the *Crown Lands Alienation Act* of 1861 "regulated only the active rights of the Crown, and did not touch the question of matters in respect of which the Crown was passive, and where rights were claimed by reason of the acts of others as against the Crown;" thirdly, that the right of way had been acquired, or at all events was in course of being acquired, before the *Crown Lands Alienation Act* of 1861 was passed, and that that Act did not operate to divest a right already acquired, or to prevent the maturing of a right in course of being acquired.

Mr. *Wills*, Q.C., and Mr. *William Wills*, for the Appellant, contended that this view was wrong, and that the direction of *Hargrave*, J., was erroneous. The *Crown Lands Alienation Act* of 1861 (25 Vict. No. 1), ss. 3, 4, 5, 6, define the only method in which, since 1861, public highways over Crown lands can be created. They expressly exclude the application of the common law doctrine of dedication from user. The ordinary doctrine of dedication as established in an old country like *England* cannot be safely laid down without qualification as a guide to a *New South Wales* jury with respect to waste lands of the Crown. The attention of the jury was never called to the very different character of the user before and after 1861. Besides, a user by the police and mail coaches is not sufficient to support a presumption of dedication against the Crown; and a wholly insufficient user before 1861 could not be supplemented afterwards. Nor can the Crown be presumed to know either by itself or its officials the use that is being made of the land. Besides, the land was under lease, and the lessee was in possession, and not the Crown or its servants. Reference was

made to 5 & 6 Vict. c. 36, as also limiting the power of the Crown to dedicate.

Mr. *Holl*, Q.C., and Mr. *J. D. Wood*, for the Respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This appeal arises in an action brought by the Appellant against the Respondent for a trespass on a plot of land purchased from the Crown under the provisions of the *Crown Lands Alienation Act*, 1861, of the statutes of *New South Wales*. He complained that the Defendant had entered the land, and pulled down some fences. The Defendant pleaded that there was a public highway over the plot of land, and justified his acts in the proper use of that highway. The question in the action is whether or not the Defendant has proved that such a highway existed. The land before the grant, which is of the date of the 1st of Februry, 1879, belonged to the Crown. There was a suggestion that it had been leased for pastoral purposes, but there is no proof that any such lease had been made.

The evidence, though stated rather shortly by the learned Judge, Mr. Justice *Hargrave*, who tried the cause, is clear and explicit. It appears that for forty years before the commencement of the action there had been a road over and across the piece of land granted to the Plaintiff, which had been used by the public with carriages, horses, and cattle, and on foot. It appears to have been the main road between *Enabalong* and *Condobolin*. The mail coaches travelled that road; teamsters conveying the produce of the country, especially wool, used it; and, in fact, it had been used by the public for all purposes, during this period, continuously and without interruption. Upon such evidence the Judge would be right, unless some positive restriction on the power of the Crown appeared, in directing the jury that they might presume a dedication of the road by the Crown to the public. The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long-continued user

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of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption, may and indeed ought to be presumed.

The jury found for the Defendant, whereupon an application was made to the Court by the Plaintiff for a new trial, not on the ground that the verdict was against the evidence, but on the ground that the Judge had misdirected the jury. We have not the terms in which the learned Judge addressed the jury, and can only obtain information of what he said from his own judgment in discharging the rule, and from the grounds stated in the rule *nisi* for a new trial. The Plaintiff is, of course, confined to these grounds. They are—"That his Honour ruled that user in this colony may be relied on, in like manner as it may in *England*, for the purpose of presuming and establishing dedication of a road over Crown lands as against the Crown; and that the user proved in this case was sufficient to entitle the jury to presume dedication by the Crown of the road in question." The Plaintiff does not complain in the first of these grounds that, supposing the same evidence had been given in *England*, the direction would not have been right; but he complains of the ruling of the Judge that user may be relied on in the colony, in the same manner as it may be in *England*, for the purpose of raising the presumption of dedication of a road over Crown lands. Their Lordships are not aware of any reason in point of law why the same presumption from user should not be made in the case of Crown lands in the colony as would be made in *England*, apart from the statute to which attention will be presently called; though the nature of the user, and the weight to be given to it, may of course vary in each particular case.

The main contention of the Appellant was, that the *Crown Lands Alienation Act* has placed restrictions on the power of the Crown to dedicate roads in the colony, and that the effect of that Act was not sufficiently regarded by the Judge in his direction to the jury. The Act was passed in the year 1861, and the 3rd section enacts this: "Any Crown lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this Act, but not otherwise." Then the 5th

section enacts: "The Governor, with the advice aforesaid, may, by notice in the *Gazette*, reserve or dedicate, in such manner as may seem best for the public interest, any Crown lands for any railway or railway station, any public road, canal, or other internal communication." It is said that, taking these two provisions together, any dedication by the Crown since 1861 must be in the manner prescribed, that is, by the Governor, by notice in the *Gazette*, and not otherwise. Assuming that to be the effect of the statute, the evidence in this case, as has been stated, shewed a continuous user of the road for forty years, which gives (the case being tried in 1880) a user of twenty-one years before the statute of 1861 came into operation, and during the time when the Crown held these lands in full right, *jure coronæ*, with full power to dedicate. Their Lordships have no difficulty in saying that the Judge was right in directing the jury that from the user of twenty-one years before the statute, continued since 1861 down to the time of the action without any interruption or interference on the part of the Crown, they might presume a dedication prior to the statute, and at a time when the Crown had power to dedicate. A further objection was that the Judge did not point out to the jury that the evidence of user after 1861 was of different and less weight than that of the previous user; but if there is any difference, the evidence of continuance and unbroken user since 1861 is stronger to raise a presumption of an old dedication than the earlier evidence, because, if there had not been an old dedication prior to the passing of the Act of 1861, the officers of the Crown might reasonably have been expected to stop the unauthorized use of the land by the public, and to put down acts which would have been, upon the hypothesis of the Appellant, a series of trespasses.

Their Lordships think it right to observe that one of the learned Judges, Sir *William Manning*, is scarcely correct in the way in which he regards the evidence. He says:—"There was then a further difficulty. It was, his Honour took it, plain that before 1861 (the date of the *Crown Lands Alienation Act*) the right by user was at least inchoate; did it follow then, that the user, then enjoyed for twenty-one years, would be put an end to by that Act?

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Would not the inchoate right run on to maturity rather than be blocked by the intermediate passing of this Act?" This language does not accurately express the presumption which arises from long-continued user. It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the Appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the Act, would have had great force. The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses. It may be that in this case the evidence of user prior to 1861 was alone sufficient to establish the presumption of dedication; but the strength of that presumption is increased by the subsequent user, and would certainly have been much diminished if the user had been discontinued after 1861. In this case their Lordships have no doubt that, the user being continuous, the direction is right, and if the direction is right, it is not contended that the verdict is wrong.

There are two cases where the principles which govern this case have been recognised: *The Queen* v. *The Inhabitants of East Mark* (1), and *The Queen* v. *Petrie* (2). It may be observed that in the present case the evidence is very much stronger, to raise the presumption of a dedication at the time when the Crown was competent to dedicate, than the evidence which was held sufficient to establish such a presumption by some possible owner of the fee in *The Queen* v. *Petrie* (2). In that case, after seven years' user without interruption of the road in question, the Court held that the Judge was right in directing the jury that they might from that user presume a dedication from an owner of the fee; though it was not proved that during that time there was any one who was absolute owner of the fee, but it being possible that such an owner then existed.

(1) 11 Q. B. 877. (2) 4 E. & B. 737.

There is only one other point which need be adverted to. The learned counsel for the Appellant referred to the Act 5 & 6 Vict. c. 36, of the Imperial Parliament, as in some way limiting the power of the Crown to dedicate roads. Their Lordships, on looking at that Act, find no such restriction in it. The 2nd section enacts:—"That the waste lands of the Crown in the Australian Colonies shall not, save as hereinafter is excepted, be conveyed or alienated by Her Majesty." The 3rd section is:—"Provided always, and be it enacted, that nothing in this Act contained shall extend or be construed to extend to prevent Her Majesty or any person or persons acting on the behalf or under the authority of Her Majesty from excepting from sale, and either reserving to Her Majesty, her heirs and successors, or disposing of in such other manner as for the public interests may seem best, such lands as may be required for public roads or other internal communications." These enactments leave Her Majesty's power with regard to public roads as it existed by the common law, and do not interfere with her right to dedicate lands for this purpose.

Their Lordships think that this appeal fails; and they will, therefore, humbly advise Her Majesty to affirm the judgment of the Supreme Court of *New South Wales*, with costs.

Solicitors for the Appellant: *Burton, Yeates, Hart, & Burton.*
Solicitors for the Respondent: *H. Kimber & Co.*

[PRIVY COUNCIL.]

J. C.* 1881 *July* 5, 6, 7.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF HERTFORD . . } DEFENDANT;

AND

KATE DOUGLAS MOORE . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Law Reform Act (Ontario)—38 Vict. c. 11 (*Canada*), s. 22—*Jurisdiction of Court of Queen's Bench and Supreme Court—Rule to set aside Verdict—Misdirection—New Trial.*

Upon a rule *nisi* calling upon the Plaintiff in an action upon a policy of life insurance to shew cause why a verdict obtained by her should not be set aside and a nonsuit or verdict entered for the Defendant pursuant to the *Law Reform Act*, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the Defendant; and for misdirection in that the jury had not been directed on the evidence to find for the Defendant; the Court of Queen's Bench for *Ontario* ordered the verdict for the Plaintiff to be set aside and the same to be entered for the Defendant, while the Supreme Court eventually reversed this order and restored the verdict for the Plaintiff, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence:—

Held, that although the Court of Queen's Bench would have had power to enter the verdict in accordance with what they deemed to be the true construction of the findings coupled with other facts admitted or beyond controversy, they had no power to set aside the verdict for the Plaintiff and direct a verdict to be entered for the Defendant in direct opposition to the finding of the jury on a material issue. Under 38 Vict. c. 11 (*Canada*), the Supreme Court has power to make any order or to give any judgment which the Court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by sect. 22 in this case, in which the Court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject.

Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where

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* *Present*:—SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it.

APPEAL from a judgment of the Supreme Court (Dec. 13, 1879) reversing a judgment of the Court of Appeal of *Ontario* (Dec. 6, 1878), which affirmed a rule made by the Court of Queen's Bench for *Ontario* (June 30, 1877), making absolute a rule *nisi* to set aside the verdict found for the Respondent in an action in that Court on a life policy, and to enter a verdict for the Appellant company.

The facts of the case, and the proceedings in the action, are set out in their Lordships' judgment.

The substantial questions raised in the appeal were:—(1.) Whether the policy had been avoided by certain misrepresentations and untrue statements made by the insured, *Charles Moore*, in his application for it. (2.) Whether, having regard to the evidence and the findings of the jury thereupon, the Court of Queen's Bench was justified in directing the verdict for the Respondent to be set aside and a verdict to be entered for the Appellant. (3.) Assuming that the Court of Queen's Bench was not justified in so doing, whether the Supreme Court of *Canada* had the power to order a new trial, and whether that course ought not to have been taken by it instead of directing the verdict for the Plaintiff to stand.

Mr. *Arthur Charles*, Q.C., and Dr. *McMichael*, Q.C., of the *Ontario* Bar (Mr. *M. D. Chalmers* with them), for the Appellant company, on the first question stated above, contended that there was sufficient evidence of misrepresentation to avoid the policy; on the second question, referred to *Etty* v. *Wilson* (1), and to the *Law Reform Act*, 37 Vict. c. 7 (*Ontario*), sects. 32, 33; and on the third question, to the *Supreme Court Act*, 38 Vict. c. 11 (*Canada*), sects. 22, 38; Revised Statutes of *Ontario*, c. 38, s. 18, sub-s. 3.

Mr. *Bethune*, Q.C., of the *Ontario* Bar, and Mr. *D. L. Alexander*, for the Respondent, contended that the verdict was right, and that

(1) 3 Ex. D. 359.

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there was no misdirection. If there had been the Appellant should have drawn attention to it at the time. The Court of Queen's Bench had no power to set aside the verdict and enter a contrary one in direct opposition to the finding of the jury. No new trial had been asked for, and even if the Court of Queen's Bench ought to have granted it, the Supreme Court had no power to do so in appeal: see 38 Vict. c. 11, s. 22. Reference was also made to an Act passed subsequently to this suit, viz., 43 Vict. c. 24.

Mr. *Charles*, Q.C., replied, referring to *Yorkshire Banking Company* v. *Beatson* (1).

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

This is a suit by one of the children of Mr. *Charles Moore*, deceased, against the *Connecticut Mutual Life Insurance Company*, upon a policy of insurance on the life of *Charles Moore*, the Plaintiff claiming the share to which she is entitled under that policy. The declaration set out the policy, together with the questions and the answers that were made to them, and concluded with a general statement that all things had happened which were necessary to entitle the Plaintiff to recover. The Defendants pleaded several pleas, of which the most material are the second and the fourth. The second plea is in these terms:—"The Defendants say that the answer given in the negative by the said *Charles Moore*, as in the declaration mentioned, to the question, 'Have you had any other illness, local disease, or personal injury; and if so, what nature, how long since, and what effect on general health?' was untrue,—that the said *Charles Moore* had, some twelve years before the time when he signed the said declaration and answered the said question in the negative, received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and which also caused to some degree inflammation of the brain,—that the blow was a personal injury within the meaning of the

(1) 5 C. P. D. 109, 113, 127.

said question,—and that the answer 'No' given to the said question was untrue, and was a breach of the warranty contained in the said application; and that by reason of such untrue answer and breach of warranty the said policy was forfeited." The third plea, which relates to dyspepsia, was disposed of in the Court below, and need not be here referred to. The fourth plea was to this effect:—"The Defendants say that the answer given to the question, 'How long since you were attended by a physician?' namely, 'About thirty years ago,' was untrue, to the knowledge of the said *Charles Moore*,—that the said *Charles Moore* had, previous to the making of the said application, and a much shorter period than thirty years, received a severe blow on the head, the effects of which remained until his death, and that whilst he was suffering under such injury he consulted and availed himself of the skill of a medical man, one Dr. *Lizars*, and that he concealed the said fact that he had so consulted the said medical man." This plea is said to have been amended at the trial, and there has been some controversy as to whether that amendment was actually made or only taken to have been made; but their Lordships will assume it to have been made. It runs thus:—"The Defendants say that the answer given to the question, 'How long since you were attended by a physician?' namely, 'About thirty years ago,' was untrue, to the knowledge of the said *Charles Moore*,—that the said *Charles Moore*, previous to the making of the said application, and at a much shorter period than thirty years, had been attended by and had consulted and availed himself of, the skill of other medical men," whose names are mentioned. Those were the pleas.

The policy is very much in the usual form of such policies, the material part of it being this:—"This policy is issued and accepted upon the following express conditions and agreements: First, that the answers, statements, representations, and declarations contained in or indorsed upon the application for this insurance, which application is hereby referred to and made a part of this contract, are warranted by the assured to be true in all respects." The form of application contains a number of questions relating to a variety of diseases, such as apoplexy, diphtheria, fistula—and a number of others. The eighth question, which is material, is

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this:—"Have you had any other illness, local disease, or personal injury? and if so, of what nature, how long since, and what effect upon general health?" to which the answer was "No." Their Lordships agree with the remarks which have been made by some of the Judges of the Courts in *Canada* that this is a question of a somewhat embarrassing character, and one which the company could hardly reasonably have expected to be answered with strict and literal truth. They could not reasonably expect a man of mature age to recollect and disclose every illness, however slight, or every personal injury, consisting of a contusion, or a cut, or a blow, which he might have suffered in the course of his life. It is manifest that this question must be read with some limitation and qualification to render it reasonable; and that personal injury must be interpreted as one of a somewhat serious or severe character. Their Lordships may observe, in passing, that the next question but one, "Are you, or have you ever been, addicted to the use" (not to the abuse or excessive use) "of alcoholic beverages, opium, or other stimulants," could be answered in the negative with literal truth only by a person who was never in the habit of drinking wine or beer, or tea or coffee (tea and coffee being stimulants); that is to say, by very few persons in *Canada*.

The next material question is, "How long since you were attended by a physician; for what disease? Give name and residence of such physician." The answer is, "About thirty years ago: lake fever: Dr. *Sampson*, of *Kingston*, who is now dead." Then:—"Name and residence of your usual medical attendant?" "Dr. *Berrick*, of *Toronto*, who attends my family, has known me some years." These answers would seem to distinguish between attendance by a physician for a serious disease, and an ordinary medical attendant for trifling ailments.

Such being the answers, it is now necessary to refer shortly to the evidence, in order to make the summing-up of the learned Judge, the questions which he put to the jury, and their answers to them, intelligible. The task of analysing it completely has been ably performed by some of the Judges of the Courts below. It is enough for the present purpose to say that Mr. *Moore* died of an injury to the head caused by striking against an iron bolt. The blow did not produce fracture of the skull, but inflam-

mation, attended by suppuration and extravasation of blood; the suppurated matter and extravasated blood pressing on the brain caused paralysis, from which death resulted. The medical men, in examining this injury and trephining, discovered that in the immediate proximity of their operation a portion of the bone of the skull was missing, that the brain in that point was covered only by skin and membrane, and that there was a slight depression into which the tip of the finger could be introduced. The great contention on the part of the company was to prove that the absence of this piece of bone resulted from a blow which Mr. *Moore* had received some ten or twelve years before, on falling from his horse or being thrown from a carriage; that his skull had then been fractured; that an operation was performed by a medical man, whereby the missing portion of the bone was removed.

Although evidence was adduced which was well worthy of the consideration of the jury, and on which they might properly have found, if they had been so minded, that this case on the part of the Defendants was proved, that evidence was by no means of a conclusive character. The medical man, Dr. *Lizars*, who is said to have attended Mr. *Moore* at the time of the accident, was dead. His assistant or partner was called, who spoke of a fall of Mr. *Moore* from his horse about twelve years before, when he said that Dr. *Lizars* attended him; but he also said that at that time Mr. *Moore* was only suffering from a contusion, and that no injury to the bone was discoverable. He spoke of no other accident to Mr. *Moore*. There was the evidence of other medical men, to the effect that it was probable that the injury might have been caused in the manner suggested by the Defendants, but that evidence fell far short of direct proof, and indeed some portion of it was not irreconcilable with the hypothesis that the loss of the piece of bone might have resulted from causes other than external violence —indeed, from congenital malformation. On the other hand, there was the evidence of a brother of Mr. *Moore* that neither on the occasion in question, nor indeed on any other occasion, was he ever so seriously injured as not to be able to attend to his business as usual. If that evidence was believed by the jury, it would go far to disprove the possibility of any surgical operation having

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been performed, whereby a portion of the bone of his skull was removed.

The learned Judge, in summing-up, commenting on the questions put by the company, observes :—"They have stipulated that his answers shall form part of the contract which he is about to enter into. They say to him, in effect, 'You must answer these questions correctly; if from forgetfulness or inadvertence you answer a question incorrectly, we hold the policy void.' They have a right to make that stipulation; but it is, in my judgment, a stipulation that should be construed with great strictness. When they put a very general question under a stipulation of that kind, it is only reasonable and just to put on that general question a fair construction; for instance, take the question they put with reference to any other illness, local disease, or personal injury; I think that question must be read in a fair and common-sense way. If the applicant had had a headache the very day before, and had not stated it in his application, it could not be said that this policy was good for nothing simply because he had not stated that; and yet a doctor would tell you that a headache was an illness, and that it came, strictly speaking, within that term. Subject to that limitation, that the questions are to be read in a fair and common-sense way, having regard to all the circumstances surrounding the man, and all the information that the company may reasonably expect to receive, I tell you that, in my view, the company have required the applicant to give correct answers to the questions they put." After some further remarks the learned Judge put these questions to the jury: "First. Had Mr. *Moore* any personal injury which must have been present to his own mind as something coming fairly within the term 'personal injury,' and which he did not communicate to the Defendants." Secondly. "Had he any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the company?" Thirdly. "Had he any personal injury which he might have been fairly expected to communicate for the information of the Defendants?" Fourthly. "Had he any personal injury which had any effect upon his general health?" Then he refers to those questions which relate to attendance by medical men, with reference to which the evidence was but slight. There

was some evidence that Dr. *Lizars* had attended Mr. *Moore*, but the partner of Dr. *Lizars* said that attendance was for a contusion and bruises; and there was evidence of other attendance, but not for serious illnesses. With reference to that evidence the learned Judge observes:—"Now the term 'attended' in a policy of this kind must also be read in a reasonable manner. The mere circumstance that a man had gone to a physician for some trifling ailment, and had received some care or attention from him, would not, it appears to me, render him the attendant of the applicant in such a sense that it would be necessary to state that he had been his last medical man, or that he had last attended him. It appears to me that the attendance meant is an attendance for something that deserves consideration, and might be expected to be present to the mind of a man when he was making an application of this kind. The object of the question, I presume, is to enable the company to communicate with the last medical man of the applicant, so that if he pleases to give them information they may get it. At any rate they would know who he is then, and have an opportunity of seeing him; but they would not require that, if the applicant had got from him a piece of sticking plaster for a cut finger, his name should be in the application. There are a number of diseases named in the application. I ask you then, in the first place:—Had Mr. *Moore* been attended by a physician for any of the diseases detailed in the application? They were all gone through by Dr. *Vallentine*, and dyspepsia is the only one he named; this you have dealt with in the previous question. The next question is a more serious one:—Had he been attended by any physician but Dr. *Sampson* for any disease whatever, or only for some trifling ailment not amounting to a disease?" The learned Judge proceeds:—"Then I put to you, to cover the ground as far as possible, these two questions: 'Did he give fair and true answers to the questions:—Have you had any other illness, local disease, or personal injury?—and if so, of what nature, how long since, and what effect on general health?' Did he give fair and true answers to the questions:—'How long since you were attended by a physician; for what disease? Give name and residence of such physician.'" The answers of the jury may be thus described:—They answer every

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question in favour of the Plaintiff. With respect to question 7,—"Had he been attended by any physician except Dr. *Sampson* for any disease whatever, or only for some trifling ailment not amounting to a disease," they say: "No; only for some trifling ailment," thereby negativing that he had been attended for a disease.

Such were the questions, and such the finding of the jury. Their Lordships observe that the learned Judge makes this remark:—"There have been no other questions suggested to me." That certainly would indicate that the learned Judge was open to any suggestion from either side as to any further question to be put; and neither side appears to have suggested any other question. The Judge upon these findings directed a verdict for the Plaintiff. It was indeed objected at the trial that he ought to have told the jury that they were bound to find for the Defendants; but, assuming that the question was one proper to be left to the jury, no objection was made to the manner in which he left it.

A rule was obtained in the Court of Queen's Bench to this effect:—"It is ordered that the Plaintiff, upon notice to be given to her attorney or agent, do shew cause why the verdict obtained in this case should not be set aside, and a nonsuit or verdict entered for the Defendants pursuant to the *Law Reform Act*, or a new trial had between the parties, said verdict being contrary to law and evidence, and under the answer of the jury to the 7th question, that he had been attended by other physicians than the one he named, though only for trifling ailments, was virtually a finding for the Defendants; and for misdirection of the learned Judge in not directing the jury that, on the evidence of the untruth of the answers to the 8th and 14th questions, they should find for the Defendants." The only objection on the ground of misdirection is that the Judge ought to have directed the jury to find for the Defendants.

Upon the case coming before the Court of Queen's Bench, that Court set aside the verdict for the Plaintiff and directed a verdict to be entered for the Defendants. From that judgment there was an appeal to the Appeal Court of *Ontario*. That Court was equally divided; therefore the appeal failed, and the judgment

of the Queen's Bench stood. Thereupon there was a further appeal to the Supreme Court of *Canada*. The Supreme Court reversed the judgment of the Appellate Court of *Ontario* and of the Court of Queen's Bench, and directed the original verdict found for the Plaintiff to stand, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence.

The first question is whether or not the Court of Queen's Bench were right in setting aside the verdict for the Plaintiff, and directing a verdict for the Defendants. Their Lordships have no doubt that the Court of Queen's Bench were wrong. In the *Law Reform Act of Canada* there is a provision that a Judge may direct the jury to make certain special findings, and himself enter the verdict; and sect. 33 directs that:—"Every verdict shall be considered by the Court in all motions affecting the same as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of parties had been expressly given for that purpose." It was under that power that the Court of Queen's Bench acted. Undoubtedly, that Court had power to enter the verdict in accordance with what they deemed to be the true construction of the findings, coupled it may be with other facts which were taken as admitted or were so clearly proved that no controversy could arise about them. But it is not in the power of a Court to enter a verdict in direct opposition to the finding of the jury upon a material issue; and that is what the Court of Queen's Bench have done. Putting aside for the moment the other questions, their Lordships refer to one question only:—"Had he any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the company?" The jury answer that question, "No;" that is to say, they find that the assured had no serious or severe personal injury. The Court of Queen's Bench, in direct contradiction to the finding of the jury, in effect find that he had had a serious or severe personal injury. So again with respect to the other issue: The jury find that he had not been attended by any physician other than Dr. *Sampson*, the person mentioned, for any disease, but only for trifling ailments as distinguished from diseases; and they further state that he answered the question

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relative to his attendance by medical men truly. The Court of Queen's Bench in effect say that he had been attended for disease, and that he did not answer the questions truly; again a finding in opposition to the finding of the jury. Their Lordships are clearly of opinion that the Supreme Court of *Canada* was right in reversing the judgment.

The question of a new trial remains; and a new trial has been contended for upon two grounds — misdirection, and the verdict being against the weight of evidence. With respect to misdirection, it has been already observed that the counsel for the Defendants, although he did insist that the learned Judge ought to have taken the case upon himself out of the hands of the jury, did not make any objection to the direction to the jury, assuming it to be a case for them; and it has been further observed that the rule does not point to any misdirection, except the not withdrawing the case from the jury. It seems to their Lordships, therefore, somewhat late for this objection to be taken; but assuming it to be open to the Defendants, their Lordships, after carefully considering the summing-up of the learned Judge, and the questions which he put to the jury,—although, no doubt, those questions may be open to some criticism, and some form of words may be suggested which might, on the whole, be more apt,—are unable to see that the jury were in any way misdirected or misled. They are, therefore, of opinion that a new trial on that ground should not be granted.

The last question is, whether a new trial should be granted on the ground of the verdict being against the weight of evidence; and this is one of more difficulty. The Supreme Court of *Canada* were of opinion that they had no power to direct a new trial upon this ground, that power being taken away from them by sect. 22 of the Act of the 8th of April, 1875 (38 Vict. c. 11), being "An Act to establish a Supreme Court and a Court of Exchequer in the Dominion of *Canada*." That section is in these terms:—"When the application for a new trial is upon matter of discretion only, as on the ground that the verdict is against the weight of evidence, or otherwise, no appeal to the Supreme Court shall be allowed." It is necessary to refer to two other sections. Section 17 runs thus:—"An appeal shall lie to the Supreme Court from all final judg-

ments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction." Section 38 is in these terms:—"The Supreme Court shall have power to dismiss an appeal or to give the judgment, and to award the process or other proceedings which the Court whose decision is appealed against ought to have awarded." If the last two sections had stood alone, the Supreme Court of Appeal in *Canada* undoubtedly would have been entitled to make any order or to give any judgment which the Court below might or ought to have given, and among other things, to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence. Their Lordships have to consider whether this power, conferred by those two sections, is taken away by the 22nd section, or, in other words, whether the 22nd section applies to a case of this kind. It is true that an application was made to the Court below for a new trial, but not only for a new trial ; it was also an application, and this was the main point of the application, to enter a verdict for the Defendants. The Court of Queen's Bench were of opinion that the Defendants were entitled in point of law to have a verdict entered for them, and did not apply their minds to the question of the granting or withholding of a new trial, nor did they exercise their discretion upon that subject. No appeal is brought in this case against the exercise or non-exercise of the discretion of the inferior Court. It seems to their Lordships that sect. 22 applies only where an appeal is brought from a judgment of the Court below in which they have exercised a discretion; and that as no such judgment was given, and no appeal on that subject has been brought in the present case, the power of the Court was the same as if no application had originally been made for a new trial, and that the Supreme Court could have ordered a new trial on the ground of the verdict being against evidence, if the Court of Queen's Bench ought to have done so. However, this question ceases to be of any general importance, an Act recently passed enabling the Court to exercise this very power. Their Lordships may observe that there is a section in the local Act, not precisely in the same terms, but to the same effect, limiting the jurisdiction of the Appellate Court of *Ontario*, with respect to which they take the same view, in accordance, as

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they understand, with the view of the Appellate Court of *Ontario*. Be this as it may, it has not been disputed that their Lordships have the right, if they think fit, to order a new trial on any ground. It has been a question requiring serious consideration whether or not that power should be exercised in this case. Undoubtedly the verdict is not altogether satisfactory. If the only question for their Lordships was whether or not they take the same view of the evidence as the jury, they might be disposed to say that the evidence on the part of the Defendants somewhat preponderates. But this is not enough to justify them in granting a new trial; to hold it to be enough would be, in fact, to substitute a Court for the jury. In order to be justified in granting a new trial, they must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury, in finding for the other party, have either wilfully disregarded the evidence or failed to understand and appreciate it. Their Lordships are unable to say in this case that the evidence is so clear and strong in favour of the Defendants as to lead them to this conclusion. Taking into consideration, moreover, that the company have all along contended, not for a new trial, for which they appear to have insisted almost for the first time here, but that they were entitled in point of law to have a verdict entered in their favour, their Lordships do not deem it their duty to send the case to a new jury, and thus probably re-commence a long litigation.

Under these circumstances, their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court of *Canada* be affirmed, and that this appeal be dismissed with costs.

Solicitors for Appellants: *Frere, Foster, & Frere.*
Solicitors for Respondent: *Champion, Robinson, & Poole.*

[HOUSE OF LORDS.]

SIDNEY FAITHORNE GREEN (CLERK) . APPELLANT;

AND

LORD PENZANCE, W. DEAN, W. WARRELL, AND J. H. WORRILL . . . . RESPONDENTS.

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1881
Aug. 2.

Ecclesiastical Law—Chancery Court of York—Contumacy—Writ de contumace capiendo—Mittimus—County Palatine of Lancaster—Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 9, 13—5 *Eliz. c.* 23, *ss.* 2, 11—53 *Geo.* 3, *c.* 127, *s.* 1—2 & 3 *Will.* 4, *c.* 93, *s.* 1—*Rules of Supreme Court, Order* II, *rule* 8.

A representation having been made against a clerk, rector of a parish within the county palatine of *Lancaster*, in the province of *York*, under the *Public Worship Act*, 1874, for offences against sect. 8 of that Act committed in the parish church, the bishop of the diocese sent the matter to the Archbishop of *York*, who sent a requisition to Lord *Penzance*—the Judge appointed under the Act, who had since the passing of the Act become official principal of the Chancery Court of *York*—requiring him to hear and determine the matter of the representation at any place in *London* or *Westminster*, or within the province of *York* or diocese of *Manchester*, as he might deem fit. The Judge heard it at *Westminster*, and there pronounced judgment, and issued a monition ordering the clerk to abstain from the practices complained of. The clerk having disobeyed the monition the Judge, sitting at *Westminster*, issued an inhibition inhibiting the clerk for three months and thereafter until relaxation from performing any service of the church within the diocese, and on his persisting in his disobedience, pronounced him contumacious and issued a *significavit* under 53 Geo. 3, c. 127, s. 1. The tenor of the *significavit* was sent by *mittimus* from the Petty Bag Office to the Chancellor of the county palatine of *Lancaster*. In accordance with an order made by the Vice-Chancellor of the county palatine sitting at *Lincoln's Inn* a writ *de contumace capiendo* was issued, under which the clerk was arrested by the sheriff of *Lancashire* and lodged in *Lancaster Gaol*. On a motion for a *habeas corpus*:—

Held (affirming the decision of the Court of Appeal), that the matter so heard before the Judge, as official principal of the Chancery Court of *York*, was a cause cognizable in an Ecclesiastical Court within the meaning of 53 Geo. 3, c. 127, s. 1, and that the Judge had power to pronounce the contumacy and issue the *significavit* under that Act:

That the county palatine being one of the exempt jurisdictions mentioned in 5 Eliz. c. 23, s. 11, the procedure required by that section as to the *mittimus* and the issue of the writ *de contumace capiendo* was applicable and was duly followed:

That the *mittimus* was not one of the writs referred to in Order II., rule 8,

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of the Rules of the Supreme Court, and was properly tested as in the name of the Queen by the Master of the Rolls:

That under the *Public Worship Regulation Act*, 1874 (37 & 38 Vict. c. 85), s. 9, the Judge had power not merely to "hear" but also to hear and determine the matter, and to do all the acts which he did at *Westminster*:

That all the proceedings were regular and there was no ground for a *habeas corpus*.

APPEAL from an order of the Court of Appeal discharging a rule *nisi* for a writ of *habeas corpus* (1).

In November, 1878, the Respondents *Dean* and two others, parishioners of the parish of *St. John the Evangelist, Miles Platting*, in the diocese of *Manchester*, sent a representation to the Bishop of *Manchester* alleging that the Appellant, the rector of the parish, at the services in his church on certain Sundays committed various offences against the Acts of Uniformity and the *Public Worship Regulation Act*, 1874, in the practice of certain postures and ceremonies, and use of certain vestments and ornaments.

The parties not having within the time prescribed by the *Public Worship Regulation Act*, 1874, stated their willingness to submit to the directions of the bishop, he transmitted the representation to the Archbishop of *York*, and the Archbishop sent a requisition to Lord *Penzance*, requiring him to hear and determine the matter of the representation at any place in *London* or *Westminster*, or within the province of *York*, or the diocese of *Manchester*, as he might deem fit.

The matter of the representation came on for hearing before Lord *Penzance* at *Westminster*, and on the 10th of June, 1879, the learned Judge pronounced judgment, and declared that the Appellant had committed all the offences charged against him except one, and on the 27th of June, 1879, issued a monition, under seal of the Chancery Court of the province of *York*, in accordance with the terms of the judgment, ordering the Appellant to abstain from the offences enumerated, and from all practices of the like nature.

The Appellant having disobeyed the monition, on the 16th of August, 1879, Lord *Penzance* issued an inhibition, under seal of the Chancery Court of the province of *York*, inhibiting the Ap-

(1) *Ex parte Green*, 7 Q. B. D. 273.

pellant for three months, and thereafter until the inhibition should have been duly relaxed, from performing any service of the Church, or otherwise exercising the cure of souls within the diocese. Notwithstanding the inhibition, the Appellant on several Sundays and other days subsequent thereto, performed divine service in his church, and otherwise exercised the cure of souls within the diocese. Prior to each step in these proceedings, the Appellant duly received notice thereof, but took no heed.

On the 20th of November, 1880, in pursuance of a notice dated the 8th of November, 1880, and served on the Appellant (to which he paid no attention), Lord *Penzance* sitting at *Westminster* pronounced the Appellant guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical in not obeying the lawful commands contained in the inhibition, and ordered that his contempt should be signified under 53 Geo. 3, c. 127. On the 25th of November, 1880, a *significavit* in accordance with the order issued, under seal of the Chancery Court of *York*, which was filed in the High Court of Justice, Chancery Division, and on the following day the tenor of the *significavit* was sent by *mittimus* from the Petty Bag Office to the Chancellor of the county palatine of *Lancaster*. The *mittimus* was tested thus—"*Jessel*," "*Murray*."

On the 7th of March, 1881, in pursuance of a notice served on the Appellant on the 28th of February, the Vice-Chancellor of the county palatine of *Lancaster*, sitting at his Chambers, in *Lincoln's Inn*, granted an application that process should issue to the officers of the county palatine for the arrest of the Appellant in accordance with the *significavit*.

On the 9th of March, 1881, a writ of attachment issued from the county palatine of *Lancaster* which recited the proceedings and the contumacy, and commanded the sheriff of the county of *Lancaster* to attach the Appellant, and to notify the execution of the precept to Her Majesty's Justices at *Lancaster* at the next assizes. The Appellant was arrested under the writ and lodged in *Lancaster* gaol.

On the 6th of April, 1881, counsel for the Appellant moved the Queen's Bench Division for a rule *nisi* for a writ of *habeas corpus*. The motion having been refused by *Grove* and *Lindley*, JJ., a rule *nisi* was granted by the Court of Appeal, and after

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argument on the 12th of April, 1881, was discharged by the Court, consisting of *James, Brett,* and *Cotton,* L.JJ. (1).

On behalf of the Respondents an affidavit was used alleging that in the case of exempt jurisdictions it had invariably been the practice that the tenor of the *significavit* should be sent by *mittimus* to the officer or officers of the exempt jurisdiction, and thereupon process for arrest be issued by the said officer or officers; and that in two instances in 1854 the transcripts of two *significavits* had been sent by *mittimus* to the county palatine, and thereupon processes in the same form as that pursued in the present case had been issued under the hand of the late *James,* L.J., then Vice-Chancellor of the county palatine.

Aug. 1, 2. *Sir J. Holker,* Q.C., and *Arthur Charles,* Q.C. (*Phillimore* with them), for the Appellant:—

The Appellant is entitled to the *habeas corpus,* for his arrest was illegal on several grounds. First, Lord *Penzance* has no power to imprison for contempt, his powers being strictly confined to those given him by the *Public Worship Regulation Act,* 1874, which contains no such power. That Act created a new tribunal with a special jurisdiction which is purely statutory, and made Lord *Penzance* the Judge. It is a mere accident that he has since become the Dean of Arches and Official Principal of the Chancery Court of *York*; the statute must be construed now just as when it was passed; the office is entirely new, and one with which the Dean of Arches has nothing to do—*per Cockburn,* C.J., and *Mellor,* J., in *Hudson* v. *Tooth* (2), though no doubt the Court of Appeal took a different view in *Dale's Case* (3). He clearly had not the power of the old Courts when the Act was passed, and therefore he has not now. The enactment in sect. 7 that, after the Judge has become *ex officio* Official Principal or auditor of the Chancery Court of *York,* "all proceedings thereafter taken before the Judge in relation to matters arising within the province of *York* shall be deemed to be taken in the Chancery Court of *York*" was inserted only to prevent its being supposed that the effect of the Act was to compound all the Courts into one. "All proceedings" means

(1) *Ex parte Green,* 7 Q. B. D. 273. (2) 3 Q. B. D. 46, 53, 55.
(3) 6 Q. B. D. 376.

all except proceedings under this Act. If meant to be included they would have been specified. Sects. 4 and 5 shew it was not intended to affect the jurisdiction of any Ecclesiastical Court. This new tribunal is not an Ecclesiastical Court. The Act directs proceedings to be taken before "the Judge," not before a "Court." Merely trying an ecclesiastical cause does not make the Judge an ecclesiastical Judge, or the Court an ecclesiastical Court, *e.g.*, the trial of an offence against the *Act of Uniformity* at the assizes. The only mode of enforcing a monition or order is that expressly given by sect. 13, viz. inhibition, and its named consequences. If the inhibition is in force for more than three years, or if a second be issued upon the same monition within three years, the benefice is void; and during the inhibition the bishop can provide for the service and raise the sum required by sequestration. But for sect. 13 the monition could not be enforced at all—*per Coleridge*, J., in *Bartlett* v. *Kirwood* (1). Suspension operates in respect of profits *pro tem*, as amotion or death: *Pinder* v. *Barr* (2); *Bunter* v. *Cresswell* (3); *Morris* v. *Ogden* (4). If the clerk interfered with any one who had been appointed to perform the service proceedings might be taken under 23 & 24 Vict. c. 32, s. 2—see *per James*, L.J.: *Dale's Case* (5). In sect. 13 "monition or order of the Bishop or Judge" can refer only to such a monition or order as has been already mentioned, and the only order mentioned is an order as to costs—sect. 9. For disobedience to a Bishop's monition the Bishop must inhibit, not the Judge; but the Judge must be applied to for directions—sect. 13. It cannot have been intended to give the Bishop or a visitor under sect. 17 power to imprison for disobedience. The rules and forms made in pursuance of the Act in 1875 and 1879 provide for no other monition or order than that mentioned in sect. 9, and do not contemplate imprisonment under any circumstances (6). Power of imprisonment is never given by implication. If the legislature had meant to confer on a new tribunal the powers of the old Court it would have said so in terms, as in the *Pluralities Act* (1 & 2 Vict. c. 106),

(1) 2 E. & B. 771, 787; 23 L. J. (Q.B.) 9, 14. 18 Jur 173-5,
(2) 4 E. & B. 105; 24 L. J. (Q.B.) 30. 1 Jur NS 205,
(3) 14 Q. B. 825; 19 L. J. (Q.B.) 357.
(4) Law Rep. 4 C. P. 687, 702.
(5) 6 Q. B. D. at p. 429.
(6) 1 P. D. 1; 4 P. D. 267.

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the *Church Discipline Act* (3 & 4 Vict. c. 86), ss. 6 to 14; the *Railway and Canal Traffic Act*, 1854 (17 & 18 Vict. c. 31), s. 3; the *Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 120; the *County Courts Equitable Jurisdiction Act* (28 & 29 Vict. c. 99), ss. 2, 8; and the *County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 Vict. c. 71), ss. 12, 23. The power to issue the *significavit* if it exists at all is given by 53 Geo. 3, c. 127, but only in a cause cognizable in an Ecclesiastical Court. Even if the Court is an Ecclesiastical Court, the proceeding was not a cause.

Secondly, if Lord *Penzance* had power to issue a *significavit* he could not do so at *Westminster*. The *Public Worship Regulation Act* by sect. 9 enabled the Judge to "hear" the matter of the representation at *Westminster*. "Hear," no doubt, means hear and determine, but when the monition is issued the matter is heard and determined, and if the Judge has the powers of the old Chancery Court of *York* he can exercise them only within the province of that Court. The provisions in sect. 9 as to twenty-eight days notice shew that the meaning of "hear" must be thus limited.

Thirdly, the power to issue the writ *de contumace capiendo* exists only by force of 57 Geo. 3, c. 127, and must follow the form given by Schedule B. of that Act. It can only be issued out of the High Court of Chancery as provided by that Act, and 2 & 3 Will. 4, c. 93, s. 1: see *Westmeath* v. *Westmeath* (1).

Fourthly, the formalities provided by 5 Eliz. c. 23, s. 2, as to the opening and returning of the writ were not complied with. If the legislature thought them necessary in the case of a writ returnable into the Queen's Bench, they would be equally so in the case of the county palatine of *Lancaster*.

Fifthly, the *mittimus* was wrongly tested; it should have been tested in the name of the Lord Chancellor as provided by Order II., rule 8 of the Rules of the Supreme Court in the case of "every writ of summons and also every other writ."

Sir H. James, A.G., and *Sir F. Herschell*, S.G. (*Danckwerts* with them), for Lord *Penzance*; and

Jeune, for *Dean* and the two other Respondents, were not called on.

(1) 2 Hagg. Eccl. 653.

THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, I can never regard the zeal and ingenuity of counsel as at all misplaced when they are exerted for the defence of personal liberty. When that is the object in view, it is quite right that all points which seem in the judgment of counsel to be at all worthy of argument should be taken; and your Lordships, I feel sure, would not allow yourselves to be biased one way or the other by any consideration either of the technical character or the minuteness or apparent insignificance of any points which might be raised, if it appeared to you that the requirements of the law in a case affecting liberty had not been complied with. But it is your Lordships' duty to hold an even hand and to remember that you are bound by the law, and that you are not at liberty to place strained constructions upon it even from any feelings of indulgence which you may entertain towards those whose liberty is in danger.

With that preface, my Lords, I will address myself immediately to the several points which have been argued in this case, and I will take them in the inverse order to that in which they have been presented to your Lordships.

The last point which was mentioned was this, that the *mittimus* was wrongly tested as in the name of the Queen, the Master of the Rolls undersigning it, and that it should have been in the name of the Lord Chancellor under certain rules made by virtue of the Judicature Acts (1). It is enough to say, my Lords, that I consider those rules to be applicable exclusively to judicial writs issued for the purpose of judicial proceedings either in the High Court or in the Court of Appeal, and that this proceeding belongs to neither of those categories. Being tested in what had been the usual manner before the Judicature Acts were passed, I conceive that the *mittimus* is properly tested, and that that objection may be at once dismissed.

The next objection was that the *mittimus*, supposing it could be issued, should have been presented to the justices of *Lancashire* under the Act 5 Eliz. c. 23, incorporated into the Act 53 Geo. 3, c. 127, in order that they might open it in Court and do with

(1) Order II. r. 8.

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it whatever might have been done by the Court of Queen's Bench in the case of a writ *de contumace capiendo* returnable into that Court. That argument appears to me to fail on the most evident grounds. When a *mittimus* takes place at all, it is under the 11th section of the statute of *Elizabeth*, and that section does not say either that it is to be sent at all to the justices before whom it is returnable, or that it is to be opened by them; but on the contrary, it says that the local authorities to whom the *mittimus* is directed are at once to issue a writ upon it returnable before the justices. Whatever, therefore, may have been the motive or purpose of the direction applicable to the Court of Queen's Bench in the Act of *Elizabeth*, that the writ *de excommunicato capiendo* should be opened in that Court to which it was returnable, there is no trace of any similar direction as to the local authorities when the writ was not returnable in the Court of Queen's Bench; and, in my opinion, it cannot be by any implication interpolated into the 11th section of that statute.

Then came an objection of a more substantial character. Your Lordships will understand that these objections, however minute, ought, in my opinion, to prevail if they are well founded in law, and if the legal requisities of a writ ending in imprisonment have not been fulfilled. The objection which I have described as more substantial is this, that under the statute of 53 Geo. 3, which substituted ordinary imprisonment under a writ *de contumace capiendo* for excommunication, nothing could be done unless the writ issued in and from the Court of Chancery. The whole object of that statute being evidently to substitute, as one of the Lords Justices said, the word "*contumace*" for the word "*excommunicato*," and in other respects to retain the old mode of enforcing ecclesiastical orders, the statute said that, when the contempt which it contemplated had taken place, it should be lawful for the Judge of the Ecclesiastical Court to pronounce the guilty person contumacious and in contempt, and within ten days to "signify the same in the form to this Act annexed to His Majesty in Chancery as hath heretofore been done in signifying excommunications." So far the form actually followed in this case was that contemplated by those words of the statute. But then the statute proceeds, "and thereupon a writ *de contumace capiendo* in the form to this Act annexed

shall issue from the Court of Chancery directed to the same persons to whom the writs *de excommunicato capiendo* have heretofore been directed, and the same shall be returnable in like manner as the writ *de excommunicato capiendo* hath been by law returnable heretofore, and shall have the same force and effect as the said writ." Upon those words, my Lords, it was argued that no writ *de contumace capiendo* could lawfully issue except from the Court of Chancery, and that in this case there was not a writ *de contumace capiendo* issued from the Court of Chancery, or, what is now the same thing, the Chancery Division, but a *mittimus* to the local authority in the County Palatine of *Lancaster*, from which local authority the writ *de contumace capiendo* was issued.

Now, pausing at those words, and not yet proceeding further, I think it is sufficiently plain, even from those words, that the intention of the Legislature was that, *mutatis mutandis*, the same procedure and no more should be followed as to the new writ *de contumace capiendo* as had before been followed as to the old writ *de excommunicato capiendo*. The next observation is, that this general practice, assuming that in ordinary circumstances the procedure would be in the Court of Chancery, follows very much the parallel legislation of the Act of Queen *Elizabeth* to which reference is afterwards made, which also assumes that the ordinary and normal course of proceeding would be by a writ issuing from the Court of Chancery, and directed to be returnable into the Court of Queen's Bench.

But the Act of Queen *Elizabeth*, taking notice that there were cases in which the writ would not be properly returnable into the Court of Queen's Bench, and providing for those cases, contained the 11th section, by which in regard to certain exempt and other special jurisdictions, of which the counties palatine of *Lancaster*, *Chester*, *Durham*, and *Ely*, were some, "where the Queen's Majesty's writ doth not run, and process of *capias* from thence not returnable into the said Court of the King's Bench after any *significavit* being of record in the said Court of Chancery," it was expressly provided that in those cases, and for that reason "the tenor of such *significavit* by *mittimus* shall be sent to such of the head officers," of those counties palatine, "within whose offices, charge or jurisdiction the offenders shall

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be resiant." Then it expressly specifies that in the county palatine of *Lancaster* it shall be sent "to the Chancellor or Chamberlain." Then it goes on to say, "and thereupon every of the said justices and officers to whom such tenor of *significavit* with *mittimus* shall be directed and delivered, shall by virtue of this estatute have power and authority to make like process to the inferior officer and officers to whom the execution of process there doth appertain, returnable before the justices there at their next sessions or Courts two months at the least after the teste of every such process." "Like process" there, I apprehend, means clearly process similar to that which in other cases would issue returnable into the Court of Queen's Bench, that is to say a writ *de excommunicato capiendo*.

The course which has been taken in this case has in point of fact followed that exceptional direction for such special cases, substituting only the ultimate writ *de contumace capiendo* for the writ *de excommunicato capiendo*. The matter arose in the county palatine of *Lancaster*; there was a regular *significavit* to the Court of Chancery, as I have called it, and from Chancery there was *mittimus*, under this clause of the statute, to the Chancellor or the Vice-Chancellor of the county palatine of *Lancaster*. By him the process of execution by the writ *de contumace capiendo* was issued to his inferior officers returnable in the proper form before the justices; and the question is whether the statute of 53 Geo. 3, which substitutes the writ *de contumace capiendo* for the writ *de excommunicato capiendo*, prescribes this process of *mittimus*, or absolutely requires in the case of the special and exempt jurisdictions, as well as in other cases, that the writ shall issue from the Court of Chancery, and, in some way that is not explained, be made returnable somewhere in a different manner from that which would have been right under the Act of *Elizabeth*. Of course, a want of due provision for those cases and for proper directions as to the mode of dealing with them, and a want of any direction that in the case of these exempt jurisdictions as well as others the writs should be returned into the Court of Queen's Bench, these defects, if they were such in fact, might not necessarily determine the question, because strange as it would be that with the Act of *Elizabeth* before them, and when

they were evidently intending to put an end to excommunication specially and to substitute the writ *de contumace capiendo* for the writ *de excommunicato capiendo* generally, the Legislature should have forgotten that there were such cases to be provided for; yet, if that had been the actual state of things, I do not say that your Lordships would have by any unnecessary implication incorporated into this Act of 53 Geo. 3 the provisions of the 11th section of the Act of *Elizabeth*.

But the answer to the objection is that the Legislature has not overlooked the point, and has expressly incorporated into this Act of 53 Geo. 3 the provisions of the Act of *Elizabeth*; for after the words which I before read, this statute of 53 Geo. 3 proceeds thus: "And all rules and regulations not hereby altered now by law applying to the said writ" (by which I do not understand the said writ when issued from the Court of Chancery, but the said writ whenever and however it can lawfully be issued—that is the writ *de excommunicato capiendo* as it was before that statute), "and the proceedings following thereupon, and particularly the several provisions contained in a certain Act passed in the 5th year of Queen *Elizabeth*"—"shall extend and be applied to the said writ *de contumace capiendo*, and the proceedings following thereupon as if the same were herein particularly repeated and enacted." If this 11th section had been herein particularly repeated and enacted, no question could possibly have arisen, and it is to be taken to have been so. It is said, Oh no! because those provisions are merely incorporated into this statute so far as they are rules and regulations applying by law to the writ issued from Chancery; but these are not the words of the statute—it is "to the said writ," and I understand "the said writ" to be the writ *de excommunicato capiendo*, whether issued from Chancery or issued in any other manner which may be found provided for by the Act of Queen *Elizabeth*. This particular case I find so provided for, and in this particular case under the Act of Queen *Elizabeth* that writ is to be issued, not direct from the Court of Chancery, but as a consequence of *mittimus* from the Court of Chancery, in substance directing it to be issued from what for that purpose was the proper jurisdiction.

I have no hesitation in saying that I think the proceedings in

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that respect are perfectly right, and I find nothing whatever to change that conclusion in the subsequent Act 2 & 3 Will. 4, c. 93. Assuming (though it is not necessary for your Lordships to decide it) that those words have a more definite aspect of application to a writ issued out of the Court of Chancery only, I apprehend the reason for it is manifest, because the whole object of that later statute is to provide for the manner of executing the writ as against persons having privilege of peerage or being members of Parliament or not being within the jurisdiction of the Ecclesiastical Courts. The persons within these various exempt jurisdictions,—I mean exempt from the ordinary currency of the Queen's writ,—which are provided for by the 11th section of the Act of *Elizabeth*, would be within the jurisdiction of the ordinary Ecclesiastical Courts, and would not be persons with respect to whose special cases the statute 2 & 3 Will. 4, c. 93, was intended.

I pass to the next point, which was this: assuming the Judge to have had jurisdiction to issue the *significavit* upon which the writ *de contumace capiendo* is in this case founded, he ought to have issued it (it is said) not, as he did, at *Westminster*, but at some place within the jurisdiction of the Provincial Court of York. That question turns upon the interpretation which your Lordships will give to the 9th section of the Act of 1874, which is intituled "An Act for the Better Administration of the Laws respecting the Regulation of Public Worship." This argument assumes that the Judge who took this proceeding was, and was acting as, Official Principal of the Chancery Court of York, and that the proceeding itself is to be deemed to have been taken in that Court. On that assumption it is said that the ordinary ecclesiastical law would require a proceeding of that Court to have been taken locally within its jurisdiction, and that this proceeding was not so taken. But the answer is, that this is a proceeding not taken under the general jurisdiction of that Court, so far as relates to the conditions of its inception and prosecution, but taken under the special provisions of this Act of Parliament of 1874 to which I have referred; and of course whether in one Court or in another, whether in a new Court or in an old Court, when an Act of Parliament prescribes a new manner of proceeding for a particular purpose, and in so far as it does so prescribe it,

that prescribed manner must be properly followed, and if properly followed the proceeding is justified, although it might not have been capable of being taken in the same way merely by virtue of the general jurisdiction of the Court.

Now the Act of Parliament under which this proceeding was undoubtedly taken says, that upon the representation of a certain matter complained of against a certain person being made, and the parties not consenting to abide by the directions of the bishop, the bishop shall forthwith transmit the representation to the Archbishop of the province, and the Archbishop shall "require the Judge to hear the matter of the representation at any place within the diocese or province, or in *London* or *Westminster*." Plainly therefore, if so directed, as in this case he was, by the Archbishop, the Judge might hear the matter of the representation in *London* or *Westminster*, although those cities might not be within the diocese or province; and that was what he actually in this case did. Well—was it right, or was it wrong? Did the authority as to place given to the Judge by those words of the 9th section extend to the particular Act and proceeding now in question? I think it did. It appears to me that the whole determination of the matter of the representation with all its necessary antecedents and proper consequences was intended by and included in that power, which is given to the Archbishop to require the Judge to "hear" it in *London* or *Westminster*. There are various things to be done by him under the Act before the hearing and preparatory to it; orders as to evidence, orders as to attendance of witnesses, notices, orders for the production of documents. Technically those are not a part of the hearing, but I entertain no doubt whatever that those things and every other thing, preliminary and antecedent to the hearing, are covered by and are included in the authority to "hear," which I consider means to hear and finally determine "the matter of the representation" which I consider to be equivalent to the cause,—the whole matter. Those antecedent things are in my judgment within that authority, and the "hearing" within the meaning of these words does not appear to me to terminate till the whole matter is disposed of; therefore it includes not only the necessary antecedents, but also the necessary or proper consequences. There is

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an illustration of one of them on the face of the same clause; there is to be a power of appeal, and "the Judge may on application in any case suspend the execution of such monition pending an appeal if he shall think fit." In the narrow sense of the word "hearing" which has been contended for, that must necessarily be a proceeding subsequent to the hearing; and if it were necessary that all proceedings subsequent to the hearing should be taken at some place within the ordinary jurisdiction of the Chancery Court of York, that proceeding amongst others would have to be so taken. But, as there is no provision in the Act that the Judge must go away from *Westminster* in order to receive such an application, it would follow, if he could not suspend the execution of a monition pending appeal elsewhere than in the province of *York*, that unless he chose to do something which he is under no obligation to do, the subject who wishes to make an appeal would be deprived of the benefit of that provision of the statute. I think that instance is quite enough to carry with it all the consequences, and to shew that the provision is applicable to all proceedings incident to and consequent upon a sentence and necessary for giving it due effect; all such proceedings, according to your Lordships' recent decision in the case of *Mackonochie* v. *Lord Penzance* (1) being proceedings in the same suit consequent upon and incident to the power of pronouncing the sentence in the suit and flowing out of that sentence. Therefore I am of opinion that the objection as to place fails.

I come, lastly, to the larger and more important question. The most important question of all, namely, whether the Judge in this case had any power at all to enforce the monition and the inhibition which he had issued, and particularly to enforce it in the manner provided by the Act of 53 Geo. 3. Now, I must return to the words of that statute, which are these, "in all causes which according to the laws of this realm are cognizable in the Ecclesiastical Courts." It has not been contended that that is to be interpreted only as the law stood in the year 1813 when that Act was passed. It has been admitted in the argument that the words "cognizable according to the laws of this realm" mean cognizable for the time being according to the laws

(1) 6 App. Cas. 424.

of the realm in the Ecclesiastical Courts. It says "that in all causes which according to the laws of this realm are cognizable in the Ecclesiastical Courts, when any person or persons, having been duly cited to appear in any Ecclesiastical Court or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees," then this process of *significavit* followed by the writ *de contumace capiendo* and its consequences is to take place. If we have not in the Act of 1874 special directions as to the mode of enforcing obedience to such orders as may be lawfully issued under it, still if those orders are orders made in causes or a cause cognizable according to the laws of this realm in an Ecclesiastical Court, and if the Court which made those orders is an Ecclesiastical Court, then I think we have a very sufficient explanation of the absence in the Act of 1874 of particular provisions and directions as to the way in which the orders of the Court or the Judge under that Act are to be enforced; because we have here a general Act of Parliament which, as to all cases of disobedience to all orders of any Ecclesiastical Court in causes which, according to the laws of the realm are cognizable in such a Court, tells you what the mode of enforcing those orders is to be. It was therefore purely and entirely unnecessary to repeat particular provisions by reference or otherwise on that subject in this Act of 1874.

We are therefore brought to the questions whether the order sought to be enforced in this case is an order in a cause cognizable in an Ecclesiastical Court, and whether the Court which pronounced that order is an Ecclesiastical Court. That, in this case, the party complained of was duly cited by proper notice within the meaning of the statute is, I apprehend, clear, and that there was disobedience is not denied; the sole question is whether it was a "cause," and whether the Court was ecclesiastical. I have no hesitation about the word "cause." It is not a technical word signifying one kind or another, it is *causa jurisdictionis*, any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular Court, and I have no hesitation whatever in saying that "the matter of a representation" transmitted by the Archbishop under this 9th section to the Judge

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under the Act, with a requisition that he should hear it, becomes at all events from the time of notice to the party affected by it, a cause cognizable by that Judge in that Court. Is he then, or is he not, an "Ecclesiastical Court?" I should have thought, I must say, that nothing in the world could be plainer than the answer to that question.

The Act of Parliament of 1874 was passed when the offices of Judge of the Arches Court of Canterbury and Judge of the Chancery Court of York were full, and for whatever reason it was thought expedient that one Judge should exercise the particular manner of jurisdiction provided for by this statute, and that it should not be divided between two Judges who might possibly not always agree; whether for that or for any other reason a provisional arrangement was made for the period of time during which those offices, or either of them, should be so full, and a new Judge was to be appointed by virtue of the Act who was to be during good behaviour the Judge of the Provincial Courts of Canterbury and York. We are not dealing now with anything that has taken place under that which I may call the provisional arrangement; but it was pressed upon us that the character of the proceeding after the cessation of that provisional arrangement ought to be regarded as the same in the view of the statute as it was before. Even if there were no words which expressly dealt with the question after the provisional arrangement had ceased, I own I could not myself have overcome the force of these words that "the Judge" (so called throughout the statute) is from the beginning under the Act of 1874 "a Judge of the Provincial Courts of Canterbury and York," which are Ecclesiastical Courts. And when it is said what that Judge is to do in dealing with the earlier stage of the transaction, I could not possibly regard him as acting in any other character or capacity than that which is alone attributed to him by the statute—the character and capacity of a Judge of one of those two Ecclesiastical Courts. What he does under the Act is done by him as an Ecclesiastical Court, and in my humble opinion it is clear that the orders lawfully made by the Judge in that stage of the jurisdiction would be orders of an Ecclesiastical Court within the meaning of the Act of 53 Geo. 3.

But it does not stop there, because the same clause expressly provides for what is to happen afterwards. The Judge, so in the first instance appointed, is, when vacancies may happen, to succeed to the two offices of Dean of the Arches in the province of *Canterbury*, and Official Principal or Auditor of the Chancery Court of *York* in that province. The offices, though to be held by one person, are as to procedure and jurisdiction to be distinct; and it is said that, from the time when that union of offices shall have taken place, "All proceedings thereafter taken before the Judge, in relation to matters arising within the province of *York*, shall be deemed to be taken in the Chancery Court of *York*." The proceeding out of which the present appeal has arisen was with regard to a matter arising in the province of *York*, and was commenced after the Judge had become under the Act Official Principal of the Chancery Court of *York*. There is an argument, which I have in vain endeavoured to follow, which suggests that "all proceedings thereafter taken before the Judge" do not include proceedings under this Act which made him the Judge and which gave him that jurisdiction. But, manifestly the word "all" includes those proceedings if there be not some context to the contrary; and so far from there being any context to the contrary, I should myself think, although the words are quite large enough to include other proceedings under the general jurisdiction of these Courts or under any particular Act of Parliament which may regulate the proceedings in these Courts, yet primarily and distinctly in the view of the Legislature, "all proceedings" do and must include the proceedings under this Act. If that be so, I think that it is enough by itself to shew that the Act of 53 Geo. 3 applies.

There are other passages of the Act of 1874 which seem to me to tend to shew that the Legislature was not guilty of the strange inadvertence of authorizing these proceedings which are specially provided for, and directing that prohibitions and inhibitions shall be issued, with the consequence of deprivation in the case of persistent disobedience after the lapse of three years, and of not at the same time arming the Judge with any power whatever to execute his orders. The words at the end of the 9th section, "The Judge may on application in any case, suspend the execu-

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tion of such monition pending an appeal, if he shall think fit," plainly shew that the Legislature contemplated that a monition might be executed; and for my own part I do not think that an inhibition such as is contemplated by the 13th section would have been very likely to have been described—certainly I am sure it could not appropriately have been described—by the term "execution." These words, therefore, have a very strong aspect as indicating that some powers were contemplated by the Legislature to execute a monition as well as to pronounce it.

But by words at the end of the 13th section the matter is made still more clear. The earlier part of that section provides that "Obedience by an incumbent to a monition or order of the Bishop or Judge, as the case may be," (I say nothing about the Bishop's jurisdiction—I assume that not to be in question) "shall be enforced if necessary" by inhibition with very serious consequences. I will even assume, in favour of the argument of the Appellant, that that means that whenever there is any necessity to enforce it at all there must be an inhibition. I must pause, however, to observe, that I am doubtful if that is so, because amongst the powers given by the 9th section to the Judge, one is to "make such order as to costs as the judgment shall require;" and I apprehend that it would be a very unlikely thing that, if the substance of a monition were obeyed as to everything except costs, it would be thought necessary on account of costs either, on the one hand, to inhibit the clergyman from performing any duty within the diocese and to deprive him of his benefice at the end of three years, or, on the other hand, so entirely to disregard the right of the party entitled to costs as to give him no means of enforcing an order in his favour except by such an inhibition, and such a deprivation of the clerk.

But be that as it may, the concluding words are, as it appears to me, plain and unmistakeable. A monition may have been issued, an order for costs may have been issued, and, as it seems to me, some other interlocutory orders might have been issued also before the hearing. No doubt before a monition there could not have been an inhibition; that particular order of course, from the nature of the case, could not have already been made when the matter was being for the first time tried before the Judge.

But that being the state of the powers of the Court and the Judge as to the orders which he might make, the concluding words of sect. 13 are, "Any question as to whether a monition or order given or issued after proceedings before the Bishop or Judge, as the case may be, has or has not been obeyed shall be determined by the Bishop or the Judge." Those words appear to me most clearly to include all orders which at any stage of the proceeding can lawfully have been made in the Court of the Judge by the Judge, whether that order be a monition, whether it be an inhibition, whether it be an order for costs, or whether it be an order for any interlocutory purpose. If the Judge has made an order, he is to determine whether it has been obeyed or not, and the section goes on to say that "any proceedings to enforce obedience to such monition or order shall be taken by direction of the Judge." The Legislature plainly contemplated that there should be such proceedings, and having made the whole proceeding a proceeding before an Ecclesiastical Court, in this case the Chancery Court of *York*, how, in the absence of express provision, would the orders of that Court be enforced? Surely, necessarily by the ordinary powers of that Court. Everything that the statute requires must be done; but when it refers generally to powers to enforce obedience, and does not prescribe any procedure, those powers generally referred to would be the powers of the Court in which the proceedings are deemed to be taken. And with regard to this particular proceeding by *significavit* of contumacy and by the writ *de contumace capiendo*, it does not rest there merely; because there is a general Act of Parliament applicable to all proceedings in the Ecclesiastical Courts, and all disobedience to lawful orders of those Courts. And if this is a lawful order of such a Court, then disobedience to that order may be punished.

I shall not enter into the question whether imprisonment is in a case of this particular kind a convenient or a desirable punishment or not; that is for the Legislature. The Legislature has so enacted, and has so enacted without excepting this particular class of cases. Again, whether such ceremonies as those which are alleged to have been unlawfully practised by this present Appellant, are ceremonies which it is desirable by law to prohibit and treat as penal, is also a question for the Legislature. A com-

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petent Court appointed by the Legislature has so determined, and whatever any individuals who are the keepers of their own consciences may prescribe to themselves as their rule of conduct, in these matters in all Courts of justice of the realm there can be but one rule, and that is that every subject of the Queen must yield obedience to the law. Under these circumstances it appears to me that your Lordships have only one duty in this case, and that is to dismiss the appeal.

I doubt whether, having regard to the nature of the case, it is your Lordships' duty, and if it is not your Lordships' duty I do not think it would be your wish, to add to the burden which the Appellant already has had to sustain, by making any order for costs.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. I think that the only point which is really one of substance is the question as to what is the construction of 37 & 38 Vict. c. 85, the *Public Worship Regulation Act.* Though I have not been able to bring myself to doubt what our decision must be upon that, still it is a matter upon which there might be some question and some argument. I have no doubt that that Act was intended to provide a particular mode in which proceedings might be instituted for what was already an ecclesiastical offence, and, according to the law then in force, might be remedied by proceedings in the Ecclesiastical Courts. It was intended to enact (for what reason the Legislature thought it expedient does not at present concern us) that proceedings for that purpose might be instituted in a different way; and accordingly it was provided that when the Archdeacon, or the different persons named in sect. 8, have made a representation to the Bishop, proceedings are to follow upon it. The Bishop may, if the parties agree in writing to abide by his directions, dispose of the matter of the representation in what I may call a summary way. With that branch of the question we have nothing at present to do, for the parties did not pursue that course. If the parties will not submit to the Bishop and agree to follow his directions, then sect. 9 says: "The Bishop shall forthwith transmit the representation in the mode prescribed by the

rules and orders to the Archbishop of the province, and the Archbishop shall forthwith require the Judge to hear the matter of the representation at any place within the diocese or province, or in *London* or *Westminster*." Now stopping there for a moment and observing that it says the Judge is to "hear" it (a word upon which I shall have to say something afterwards) it seems to me quite plain that there is a peculiar mode of bringing the case before the Judge, but that what he has to do is to perform his duty as an Ecclesiastical Judge in disposing of that case. He is to hear it, and it is to be noticed that he is to hear it at *Westminster* (I will leave the other places out), if the Archbishop so directs.

Then, the first question comes to be, What is the effect of the statute as to what it says there that "the Judge" is to do? We have not at present to decide this question as to the Judge before he became Official Principal. When the Act was passed, there was what my noble and learned friend has happily enough called, a provisional state of things provided for, by which the Judge who was to be appointed was made a supplemental and additional Judge of the Provincial Courts of both *Canterbury* and *York*, and for the time proceedings were to be taken before him as such; but it was further provided by the latter part of sect. 7, that "Whensoever a vacancy shall occur in the office of Official Principal of the Arches Court of *Canterbury*, the Judge shall become *ex officio* such Official Principal, and all proceedings thereafter taken before the Judge in relation to matters arising within the province of *Canterbury* shall be deemed to be taken in the Arches Court of *Canterbury*; and whensoever a vacancy shall occur in the office of Official Principal or Auditor of the Chancery Court of *York*, the Judge shall become *ex officio* such Official Principal or Auditor, and all proceedings thereafter taken before the Judge in relation to matters arising within the province of *York* shall be deemed to be taken in the Chancery Court of *York*." Now it happened, before any of these proceedings were instituted, that the Judge had become the Official Principal of the Chancery Court of *York*, and this was a proceeding relating to matters within the province of *York*, and consequently by the express terms of the Act that proceeding was to be "deemed to be taken

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in the Chancery Court of *York*." Some argument was used to the effect that these words might have a sensible, though a very unnecessary, meaning, if they were read as saying that, by the fact of the same person becoming the Judge of both Courts, the two Courts would not merge together. Doubtless if it was thought fit to follow such a fanciful course, the words would, I think, be enough for that purpose; but it does not seem to me that there is sufficient reason for cutting down the obvious meaning of the words which say that "all proceedings" (which would include *any* proceedings) "taken before the Judge," after he has become Official Principal of the Chancery Court of *York*, "shall be deemed to be taken in the Chancery Court of *York*."

When once that has been determined it seems to me that the rest of the Act is plain enough. It says that the proceedings shall be taken in an Ecclesiastical Court, namely, the Chancery Court of *York*, and shall be taken before "the Judge" who has now become the Official Principal of that Court; he shall hear the matter at *Westminster* if he is so directed by the Archbishop. Now comes the question, what does "hear" mean? It was disclaimed, and no doubt justly disclaimed, that it was ever intended to argue that it only meant to hear what was said, and that it did not include determining. Unless there be something which by natural intendment, or otherwise, would cut down the meaning and intention of the Legislature and make it less, I apprehend there can be no doubt that the Legislature, when they direct a particular cause to be heard in a particular Court, mean that it is to be heard and finally disposed of there. And further, when they say that it is to be heard (meaning heard and finally disposed of) in a particular Court, they mean, unless there is something in the context which either by natural interpretation or by necessary implication would cut it down, that in all matters which are not provided for that Court is to follow its ordinary procedure.

Now taking that, as I think it must be taken, to be the case, it seems to me to dispose at once of almost all the objections which have been raised before us. In the first place, sect. 9 of the statute expressly says that the Judge may make orders as to costs. How are those orders to be enforced? The statute is absolutely silent. It cannot be that it was intended that an order

for costs should be enforced by inhibiting a clergyman from performing service; that would be too absurd to be supposed for a moment. It cannot be that an order for costs was not to be enforced at all. Then what does the Legislature mean when it authorizes the Judge to make an order for costs? Such an order would not necessarily be against the incumbent, for it might be against the other side. When the Legislature says that the Judge may make orders for costs, it must mean that those orders shall be enforced in the ordinary way in which Ecclesiastical Courts do enforce their orders for costs.

Then the statute goes further, and says that there may be a monition issued by the Judge. I pass by any notice of what was to be done in the case of a monition from the Bishop, because that question does not arise here; but there may be a monition from the Judge, and it is said by sect. 13, "Obedience by an incumbent to a monition or order of the" "Judge," "shall be enforced, if necessary, in the manner prescribed by rules and orders, by an order inhibiting the incumbent from performing any service of the Church." Now it was said that that mode of enforcing obedience was exclusive of other modes. I have already intimated that I do not think it could be so in all cases, because I do not think it could possibly be so in the case of enforcing an order for costs. However, passing that by, I am not prepared to say whether or not, a monition having been issued to forbear in future from acting in the manner in which the clergyman is represented and found to have been acting, that monition could be enforced in any other manner. I apprehend that no Judge in the exercise of a reasonable discretion would think of passing a sentence of suspension, or deprivation, and still less of sending a *significavit*, before he had tried taking this course which the Legislature has pointed out of granting an inhibition for three months and no more; therefore, whether or not it would be absolutely beyond his power to do it, we need not be concerned about. But when the inhibition is granted and is in its terms (as the Act itself says the inhibition shall be) to inhibit him "from performing any service of the Church or otherwise exercising the cure of souls within the diocese for a term not exceeding three months," is it possible that the Legislature meant that order should be made and that

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if disregarded, it should be disregarded with perfect impunity? It may be disregarded with perfect impunity unless the interpretation of the Act is what I have already said, namely, that there being nothing either by express terms or by necessary implication to prevent it, obedience to that order of inhibition is to be enforced by the ordinary process of the Ecclesiastical Court as applicable to such a case as that. Otherwise there would be no remedy at all; for as for the supposition that there could be any Common Law remedy, upon the ground that this inhibition amounted to deprivation and so gave rise to an action of trespass, and gave a right to turn the clergyman out, I take it that that is perfectly idle. There is no remedy at all unless there be a remedy by the Ecclesiastical Law and by the powers of the Ecclesiastical Courts; and it seems to me that there must be that remedy.

Then comes the question, there being that remedy, can the writ *de contumace capiendo* be used for the purpose? I have been quite unable—I do not say it disrespectfully to the learned counsel who argued the case, because I do not see how they could be expected to make facts for themselves—but I have been unable to perceive any reason why it should not be used. By Common Law, long before the statute of *Elizabeth*, the only remedy the Ecclesiastical Courts had besides their ecclesiastical censures, including deprivation and suspension, was to excommunicate; and the Common Law of *England* establishes that when a proper competent tribunal—which it was decided that the Pope was not, for an order of excommunication by the Pope did not justify a *significavit*—but when a proper competent tribunal excommunicated a person in the course of a judicial proceeding and signified it to the Chancellor, he would issue the writ *de excommunicato capiendo*, which writ, it appears, was not returnable in open Court, but was simply a writ ordering the sheriff to take the excommunicated person; and, inasmuch as the Queen's writ did not run in the counties palatine and other exempt jurisdictions, I apprehend that at Common Law the Lord Chancellor could not have issued a writ to be executed in *Lancashire*, but he must have sent a *mittimus* to the Chancellor of the duchy or county palatine of *Lancaster*. In those early times when this course of procedure was established, the duchy of *Lancaster* was

not attached to the Crown. I suppose therefore that the *mittimus* came to the Chancellor of *John of Gaunt*, or whoever was the Duke of *Lancaster* at the time. It must have been a *mittimus* going to the Chancellor of the duchy or county palatine commanding him to issue the writ.

However that does not matter much, because it is all done away with by the Act of *Elizabeth*. That Act recites that writs *de excommunicato capiendo* were disregarded and disobeyed, inasmuch as they were "not returnable into any Court that might have the judgment of the well executing and serving of the said writ." Then, in order to remedy that it proceeds to enact that "every writ of *excommunicato capiendo* that shall be granted and awarded out of the High Court of Chancery, against any person or persons within the realm of *England*, shall be made in the time of the term, and returnable before the Queen's Highness, her heirs and successors, in the Court commonly called the King's Bench, in the term next after the teste of the same writ, and that the said writ shall be made to contain at the least twenty days between the teste and the return thereof; and after the same writ shall be so made and sealed, that then the said writ shall be forthwith brought into the said Court of King's Bench, and there, in the presence of the Justices, shall be opened and delivered of record to the sheriff or other officer to whom the serving and execution thereof shall appertain;" "and if afterwards it shall or may appear to the Justices of the same Court," then it goes on to say what shall happen if it appear that the writ has not been executed. That Act provided that when the writ was the Queen's writ coming out of Chancery, it was no longer left a simple writ but was to be made returnable into the Court of Queen's Bench, and there is an express direction there given that it shall be brought to the Queen's Bench in term time, and opened, as I should say, having regard to the words of the preamble, in order that it might be delivered to the sheriff, so as to fix the sheriff with the responsibility as to its being properly executed. However, whether that be so or not, the question does not arise here. In *Dale's Case* (1) the Court of Appeal held that it should be brought into open Court, and that the direction was not properly followed

(1) 6 Q. B. D. 376.

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unless that was done. They also held that the object was that the Court of Queen's Bench might examine the writ in order to see whether it was such a writ as they would execute or not. I greatly doubt whether that was the purpose for which the statute was passed; however that is not material; the probability is that the Court of Appeal were perfectly right in saying that there being that express enactment, it must be pursued or else the writ would be ineffectual.

But then the writs *de excommunicato capiendo* issued by the Court of Chancery were within the county palatine of *Lancaster* a mere dead letter, because the Queen's writ did not run in that county; and the consequence was, I apprehend, at Common Law, that when a *significavit* was sent to the Lord Chancellor he could not issue his writ to a place within the county palatine of *Lancaster;* but, as I said before, at Common Law he sent his *mittimus* with a transcript of the *significavit* to the Chancellor of the duchy of *Lancaster*, and directed him to see that the writ was issued. The statute expressly says that that course, whether it was the original old course or not, shall be followed. By sect. 11, after reciting that there are jurisdictions and places "where the Queen's Majesty's writ doth not run and process of *capias* from thence not returnable into the said Court of the King's Bench," it goes on to provide that "after any *significavit* being of record in the said Court of Chancery, the tenor of such *significavit* by *mittimus* shall be sent" "to the Chancellor or Chamberlain for the said county palatine of *Lancaster*," and he shall direct his subordinates to issue the writ, and to make that writ returnable in the county palatine of *Lancaster*.

That was the old Common Law form as altered by the statute of *Elizabeth*, by which obedience to the Ecclesiastical Courts was enforced in the Court of Chancery. Then came the statute of 53 Geo. 3, c. 127, which abolished excommunication (which obviously must have been a very offensive thing to people who had a reverence for the forms of religion) altogether in civil proceedings, and substituted for it the writ *de contumace capiendo*. It could not have been the intention of the Legislature that the writ *de excommunicato capiendo* being gone, the writ *de contumace capiendo* should not be enforcible against persons within the county pala-

tine of *Lancaster*. That is too absurd. They evidently wished that that writ should run in the county palatine of *Lancaster*; and when the statute said that all the provisions of the Act of *Elizabeth* should be read as if they were re-incorporated into that Act, I am quite unable to see why the provisions of sect. 11, including the *mittimus*, should not be held to be read into that Act of Geo. 3. If that be so, it seems to me that on the principle I mentioned before, that the acts of the Court are to be enforced in the manner in which other acts of the Court are enforced, it would follow that this was to apply to the writ *de contumace capiendo*. But besides that I need not repeat the words which have already been read by the noble and learned lord on the woolsack, which shew that if the words of the statute of 53 Geo. 3 had been picked for the very purpose of meeting such a case as this, they could not have been better chosen, for they enact that whenever there is an ecclesiastical cause cognisable in an Ecclesiastical Court, obedience to an order of that Court in such a cause shall be enforced by a writ *de contumace capiendo*.

Having said that, I may almost pass over all the rest of the arguments. I have already said that, in my opinion, "to hear the matter of the representation," means to do everything necessary to dispose of it; and as the Judge is to hear it at *Westminster*, I think he is to do everything he has to do in order to dispose of it at *Westminster*. I do not see how it could be taken otherwise. Then I think, as this writ *de contumace capiendo* was in obedience to the *mittimus*, and was never returnable into the Court of Queen's Bench at all, no point arises as to the opening it and delivering it of record in term time in the Court of Queen's Bench. I cannot see the slightest ground for saying that the statute of *Elizabeth*, or the statute of *George* III., contains any provision to the effect that it shall be opened in the Common Pleas of the county of *Lancaster*; indeed, that would practically not be possible, for the Court of Common Pleas was not sitting in the county palatine of *Lancaster*.

I need hardly say as to the last point, which supposed that Order II., rule 8, of the rules under the *Judicature Act* had made a difference in the form in which a writ of *mittimus* is to be tested, that it does not apply to such a writ at all. The rule applies to

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writs of summons, "and other writs," meaning, of course, other writs of a similar nature; that does not apply to this writ.

I consequently think that, on all the points which have been mentioned, the applicant is properly and legally detained in custody, and therefore the writ of *habeas corpus* should not be granted. I consequently agree with the motion that has been proposed, that the appeal should be dismissed. I think it has not been the custom generally in the Courts, when there has been an application for a *habeas corpus*, to fix the party applying with the costs. I am not quite sure about that, but I certainly think that in this case, unless there is a fixed rule, it would be better not to give costs.

LORD WATSON:—

My Lords, I am quite of the same opinion, and I do not think it necessary to add anything to the observations which have fallen from your Lordships, in all of which I agree.

Order appealed from affirmed, and appeal dismissed.

Lords' Journals, 2nd August, 1881.

Solicitors for Appellant: *Brooks, Jenkins, & Co.*
Solicitor for Lord *Penzance*: *Solicitor to the Treasury.*
Solicitors for the other Respondents: *Tebbs & Sons.*

[HOUSE OF LORDS.]

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THE CONSERVATORS OF THE RIVER LEE NAVIGATION . . . . . } APPELLANTS;

AND

REUBEN BUTTON . . . . . RESPONDENT (1).

Lee Navigation—Towing Path—Evidence of Ownership—Presumption—Onus Probandi.

Provisions in different Acts of Parliament appointed conservators of a river navigation, and gave them full powers to do what was necessary for carrying the object of the Acts into effect, including powers to purchase land and levy tolls. The conservators executed the powers of the Acts so far as related to the improvement of the river navigation, and the making of towing-paths—and they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, and had been used to form the towing-paths:—

Held, that, as the Acts might be carried into effect without purchasing, the burden of proof lay on the conservators to shew that they had purchased; and since they had failed to shew it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing-paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing-paths.

THIS was an appeal against a decision of the Lords Justices which had varied a previous decision of Vice-Chancellor *Malins* (2).

The Act 13 Eliz. c. 18, was passed for "the bringing of the river *Lee* to the north side of *London*." It authorized the Lord Mayor, &c., at any time thereafter to make the new cut, and "to have, take, and use for the purpose aforesaid such and so much ground during and by all the length as the said new channel, cut, or river shall pass, as shall be requisite for the conveying of the said water, and also fifty or threescore foot in breadth on each side of the said river, by all the length of the same, &c." The purpose was thus stated, "that all people may with ease go in and out of their tilt-boats, &c., without peril, and so walk, &c., also

(1) This report was prepared for the press by the late Mr. *Charles Clark*, Q.C.

(2) 12 Ch. D. 383.

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that the bargemen may, upon the same ground, without offending any other, draw their vessels from place to place alongest the same." The Mayor, &c., were to "have the said ground alongst all the said whole length for such composition as they shall make," with the lords, owners, and occupiers of the soil and ground. They were not to take any man's ground until they had compounded with the owners, and within ten years after the passing of the Act they were to make the cut. The cut and the towing-path were made accordingly.

In 1767 was passed an Act (7 Geo. 3, c. 51) "For improving the navigation of the river *Lee*." This Act appointed the Lord Mayor and a great many gentlemen trustees for the purposes of the Act, and enabled them to make such bridges and erect cranes along the length of the river as they should think necessary, and to make towing paths along any of the lands, and generally to perform all acts, &c., which they might think necessary for maintaining and improving the navigation, and the persons affected by these acts were to be compensated. Power was given to the trustees to purchase the lands required from all persons whether under disability or not. The navigation was to be a free navigation for all persons whatever, and the free use of the towing-paths was secured to all, subject to the rates and to the by-laws fixed and settled by the trustees. Cuts and towing-paths were made under the authority of this Act, and in 1770 the projected navigation was completed.

Many of the books of the trustees were lost, and there were no conveyances produced at the trial to shew the legal transfer of any of the lands of adjoining owners to the trustees, but an Act (19 Geo. 3, c. 58) was produced, which appeared to have been passed to enable them to increase their tolls that they might have the means to satisfy their creditors. Among the payments chargeable against the trustees were enumerated "arrears of interest, annuities, rents, compensations, and purchase of lands."

The Appellants admitted that some small sums had been paid to individuals, in respect of land adjoining the towing-path before the year 1835, but not since, and they drew from that fact the inference that these were annuities the title to which had ceased, the compensations being completely satisfied. The receipts ap-

peared to be for sums of 30*s.*, and the persons to whom they were paid (Mr. *Bell* and Mr. *Bailey*) were described as "occupiers."

The case had been heard before Vice-Chancellor *Malins*, who on the 20th of May, 1878, gave judgment against the Defendant, and granted a perpetual injunction to restrain him from using the towing-path with horses and carriages, &c., or otherwise than as a footway, or in any manner inconsistent with the free and convenient navigation of the river; and costs were awarded against the Defendant (1). On appeal this decision was reversed, on the ground that "the Plaintiffs" (the present Appellants) "have not established any right to the freehold, or any possessory right to the soil, of the towing-paths connected with the river *Lee*," but a perpetual injunction was awarded to restrain "the Defendant, his agents, &c., from in any manner damaging or obstructing the towing-path connected with the river *Lee* navigation, or using the same in any manner which interferes with its free use for the navigation of the river," and the Plaintiffs were ordered to repay to the Defendant the costs they had received from him under the Vice-Chancellor's judgment and also his costs of the appeal (2). The Plaintiffs then brought this appeal.

John Pearson, Q.C., *Romer*, Q.C. (*Bond Coxe* with them), for the Appellants.

The object of the various Acts was to provide an easy and convenient mode of communication between the town of *Hertford* and the *Thames*, by means of this navigation. That was a public object and sought to be accomplished by the appointment of trustees empowered to carry it into effect, having the requisite powers conferred on them for that purpose. Afterwards by the change of trustees into conservators of the navigation, similar powers were conferred and duties imposed on them for the same purpose. These powers were useless, and these duties were impossible of performance, if the conservators had no title to the soil over which the powers were to be exercised and as to which the duties were to be performed. For whatever the conservators might determine and order could be disregarded, and they would have no authority to enforce their orders. If every landowner along the

(1) 12 Ch. D. 383. (2) 12 Ch. D. 399.

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line of the navigation was the owner and master of the land opposite his own private property, the conservators would have no right to enter upon it to maintain the navigation, and to provide for the freedom of the exercise of the right of navigation which it was the object of all the Acts to secure for the use of the public. It was true that the conservators, though expressly authorized to impose tolls, could not appropriate them for their own benefit, and so appeared to have only a defective title to them, but that was in accordance with the spirit of the Acts, which was entirely directed to effect a purpose of public benefit. But it did not at all shew that the conservators' rights were no greater than those of persons who had merely to receive the tolls and pay them away again. The tolls were to be employed for the purpose of maintaining and improving the navigation, in other words for the purpose of effectuating that public duty the performance of which had been imposed by the Legislature on the conservators. There was no doubt that the Legislature had endeavoured to effect this public purpose with as little intermeddling as possible with private rights, and so the landowners along the line had been allowed access to the towing-path, but that was to enable them to have access to the river, not to allow them to use the towing-path in such a way as to interfere with its free and convenient use by the navigators of the river. In the same way all persons were free to use the towing-path as a footpath, but not so to use it as to cause any obstruction to the navigation. But how were these abuses to be prevented, if the conservators had no powers but of that anomalous and unintelligible kind for which the Respondent contended? There were cases of course in which persons might be invested with powers of a limited kind, to effect a limited object. But that could not be so with those who were selected by Parliament to improve and maintain the free and convenient navigation of a river for the benefit of the public.

The power to purchase lands for the purposes of the Acts was given to the conservators, and, beyond that, they were forbidden to take the lands of any man without making him compensation. They had long possessed these lands, there was no doubt of that, there could be none that they must have acquired them in the way authorized and required by the Acts. It was true that they did

not possess the conveyances which would, in point of form, establish their legal title to these lands, but the fact of long and undisputed possession, and the other fact (set up by the Respondent himself) that certain payments had been made before 1835, pointed plainly to the conclusion that compensation, in the way of direct purchase, or of annuities, may have been made, and that all the compensations were now at an end. In the course of the argument *Winch* v. *The Conservators of the Thames* (1), *The King* v. *The Severn and Wye Railway Co.* (2), *Hollis* v. *Goldfinch* (3), and *The Lord Advocate and The Clyde Navigation Trustees* v. *Lord Blantyre* (4), were referred to and commented on.

J. N. Higgins, Q.C., *Crossley*, Q.C., and *Birrell*, appeared for the Respondents, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, I believe that all your Lordships are of opinion that it is unnecessary to hear the counsel for the Respondent. This case comes before your Lordships on an appeal from an order of the Lords Justices, varying an injunction of Vice-Chancellor *Malins*. [His Lordship having stated the nature of the case and the decisions in the Court below, proceeded :—]

This question depends upon certain Acts of Parliament, and on those things which have been done under them. The principal Act is an Act of 1767, the 7 Geo. 3, c. 51, having in it a series of clauses which I will now proceed to mention, postponing for the present the consideration of those which relate to the purchase of land. The first clause, independently, as I think, of the purchasing clauses, gives power to the commissioners of the navigation to make the necessary improvements in the river itself, "and also to set out and make towing-paths or haling-ways upon any of the lands or grounds aforesaid, for towing or drawing with men or horses or other cattle, boats or other vessels using the said navigation." The second clause provides "that a full and adequate satisfaction and compensation be made in manner hereinafter mentioned, to all persons for the damages they may sustain from

(1) Law Rep. 9 C. P. 378.
(2) 2 B. & Ald. 646.
(3) 1 B. & C. 205.
(4) 4 App. Cas. 770.

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the carrying this Act into execution as aforesaid." My Lords, I said I would not dwell at present upon the purchasing clauses. There are purchasing clauses in the Act, and for the purposes of this case they will have to be considered; but I regard those purchasing clauses as being independent and additional,—not as taking away the powers which, if the purchasing clauses had not existed in the Act, would have been given by these original clauses which would have enabled the commissioners, although they did not purchase, to make and set out towing-paths provided they made compensation, for which adequate provision is contained in the Act.

Well, my Lords, the other clauses which may be mentioned in connection with these powers, are, in the first place, the 94th, a clause which enables them, and, as I think, obliges them to a certain extent, to set up gates in order to prevent cattle and other animals from straying along the towing-path from one property to another. It says that they "shall cause to be made, set up, and from time to time maintained and kept in repair, convenient and substantial gates," and so forth, "in the towing paths," "where the same shall respectively be necessary." That I apprehend is for a purpose which was necessary and proper to be provided for, but one in no degree requiring in itself the possession of any right to the soil. The 69th clause says "that the said navigation shall from henceforth be a free navigation, and that all the King's liege people whomsoever shall and may have and lawfully enjoy free passage along, in, through and upon the channel of the said river" "for boats," and so forth; but that is to be "subject to the orders and by-laws which shall be from time to made by the trustees, or any seven or more of them, for the regulation of the navigation." I should have mentioned that the 1st section, part of which I read before, says at the end of it, that the trustees may do all things necessary for maintaining the navigation and executing, generally, the powers vested in them. The 100th clause gives an express power "to make by-laws, orders, and constitutions for the good and orderly using of the navigation," and for other purposes, with fines and forfeitures. And penalties for any damage to the navigation are imposed under the 104th clause:—"If any person or persons shall wilfully and mali-

ciously cut, break down, damage, or destroy any banks or other works erected or made, or to be erected or made, for the purposes of the said navigation," the persons who do so "shall be adjudged guilty of felony."

Then, my Lords, in connection with those clauses, it is proper to mention the 111th which relates to certain rights of riparian owners: "Nothing in this Act contained shall be construed to obstruct or hinder the lord or lords of the manor or manors, or the owner or owners of any lands or grounds lying upon or near the banks of the said river, or of any lands or grounds through which the said cuts shall be made, from making or erecting any warehouses, weigh-beams, cranes, quays, landing-places, or wharves upon the banks of the said river or cuts in and upon their own lands, wastes, or grounds, so that the erecting or using of such warehouses, cranes, or wharves do not obstruct or prejudice the said navigation or any of the powers given by this Act." And, my Lords, that clause appears to me strongly to confirm the conclusion which I draw from the earlier clauses, that the Legislature did not contemplate that the purchase and taking of land would be necessary for the purpose of setting out the towing-paths or for the purpose of the navigation, although it thought right to give power to purchase, and to take even by compulsion; because this clause, speaking of what is to be done by the adjoining owners upon their own lands, plainly contemplates some things being done which it is difficult to suppose could be done if in all cases there were between their lands and the river a towing-path interposed over which they had no proprietary right.

I said, my Lords, that I would consider how this case stood, or would stand, upon the clauses which I have referred to in the Act, supposing there were no power to purchase. It appears to me that it is quite clear, that had there been no other clauses in the Act than these, not only would purchase not have been necessary, but purchase might not have been possible. At all events compulsory purchase would not have been possible; and yet there would have been abundantly sufficient powers to do everything required for the purpose of the navigation. All the acts proved to have been actually done by the trustees or the conservators would properly and consistently have been done under those

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powers. For example, they made by-laws for the purpose of excluding trespassers, and I think quite properly and legitimately, whether you look to the original Act or to the Act of 1868. Notices to exclude trespassers and to prevent animals straying upon the line; fines to be recovered before magistrates for a breach of the by-laws; repairs to keep the towing-path in proper order and condition; everything that was incident to the use of the towing-path, such as the erection of gates, which by one of the clauses I have read are expressly required to be put up (and the evidence in this case appears to me to shew that one of the gates was placed in a position where, if not necessary, it would at all events have been proper); all these are acts which if not necessarily done, would have been properly done, under one or other of the clauses I have referred to in the Act of Parliament, though no purchase whatever of soil had been made.

One of the cases which I see is mentioned by Vice-Chancellor *Malins* as having been referred to before him in the argument, namely, the case of *Hollis* v. *Goldfinch* (1) is at least an illustration of the perfect consistency of all such Acts with the powers contained in the clauses I have read, apart from any purchase, and apart even from any compulsory power to purchase. The case of the *Lord Advocate and the Clyde Navigation Trustees* v. *Lord Blantyre* (2) determined that very large powers, as large, and I rather think larger than those in this Act, given to the trustees of the *Clyde* navigation for the purposes of the improvement of that river, and which might be exercised upon the foreshore of Lord *Blantyre's* property, did not make it necessary for the trustees by purchase (although in their later Acts there were purchasing powers) to acquire that foreshore, and did not in any way entitle them as against Lord *Blantyre* to set up a claim of adverse possession and ownership, by reason of the acts of this nature which they had done upon his soil so as to exclude his proprietary rights.

Well, then, my Lords, the question really comes to be this: There were undoubtedly purchasing powers in the Act; the 5th clause enabled the commissioners to purchase, but did not compel them to do so; the 7th clause enabled them, if they thought

(1) 1 B. & C. 205. (2) 4 App. Cas. 770.

necessary, to exercise compulsory powers, not for the particular purposes of the towing-paths, but in a more general way; and, therefore, although it was quite possible for them not to exercise those powers but to do everything they have done without purchasing, still it was possible for them to use those powers and to become purchasers. The first question which I ask your Lordships to consider is, upon whom the *onus probandi* lies under these circumstances. The trustees might or might not purchase, the question is, Did they purchase or did they not? Is it to be presumed that they purchased, or is it necessary for them to prove that they did so? I think, my Lords, that, as the purchasing would be an act which would change the title to the soil in a manner not necessary for the purposes of the statute, the burden of proof is upon them to shew that they did purchase. They assert an exclusive title, which, if they had acquired it, would displace the title of the previous proprietor. It is for them to shew it, and if all the acts they have done are consistent with the other alternative, then they must produce evidence upon which a conclusion of that kind can be founded.

Now, my Lords, what evidence do they produce? They shew that before the works under the Act were executed, the trustees had plans prepared by an eminent engineer named *Smeaton*. He divided the work to be done into sections. I will disregard what he advised as to other sections, but he advised that in the particular section which includes the towing-path in question, there should be some lands purchased by the trustees, amounting in the whole, I think, to sixteen acres. He does not specify, and there is no evidence which does specify, the particular position of those sixteen acres of land or the particular purposes for which they would be required, whether for making cuts, for straightening the river, as in some places it was done, for making towing-paths, or for any other purposes which they had authority to carry out. So far all that appears is this: that Mr. *Smeaton* contemplated the acquisition by purchase of sixteen acres of land, somewhere or other, within a considerable section, a small part of which is now in question. That does not carry the matter very far. He also contemplated that the expense of making towing-paths, and doing a number of other things which are mentioned,

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would be altogether upon the average £20 a mile. Towing-paths, if they did not find them already existing, they would certainly have to make. That, therefore, carries us very little further still. Then what followed? It appears that on the 1st of July, 1767, there was a resolution to execute the powers of the Act and to make towing-paths. There was nothing whatever said about the purchase of this particular land, or, as far as I can see, of any land, for the purpose of the towing-paths. Mr. *Child*, one of the principal witnesses for the Appellants, says (1) that the existing towing-paths (for there were towing-paths then in existence) were made use of as far as they could be. That certainly does not shew that it was thought necessary to buy the soil.

Then what have we added to those facts? Nothing but a thing which might have been important if Mr. *Bell* and Mr. *Bailey* had been proved to be the owners in fee of this land, namely, that from the year 1767 to the year 1835 inclusive there was paid to a person named *Bell* first, and afterwards to a person named *Bailey*, a sum of 30*s.* a year for the land taken for the purposes of the navigation, and in some receipts described as used as a towing-path; and one of the witnesses, not I think in a manner which is very conclusive, but in a manner which for the present purpose I will assume to be sufficient, says that he thinks he can identify the land described in those receipts with a portion of the towing-path now in question. As the greater part of the wharf was called *Bell's Wharf* and the lane is called *Bailey's Lane*, it is probable, and I will assume, that Mr. *Bell* and Mr. *Bailey* had something to do either with the proprietorship or with the occupation of the land which now belongs to Mr. *Button*. My Lords, in those receipts Mr. *Bell* and Mr. *Bailey* are described, not as owners, but as "occupiers." Payment to occupiers, however, it might be explained, would certainly not be evidence of the purchase of the fee simple for a perpetual rent-charge from the owner; and when we find that these payments entirely stopped in the year 1835 it is still more necessary to add something further before you can infer, from the fact of that payment of 30*s.* a year having been made to those persons for so long a time, that there was a purchase in fee simple of the soil of this towing-path

(1) Printed papers in the case, pp. 77, 79.

from those owners. They are not shewn to have been owners, they are not described as owners, and if there had been this perpetual rent-charge, how is it and why is it that that has not been paid since the year 1835?

But, my Lords, not only is there a deficiency of all explanation and of further evidence upon these points, but you have to consider on the other hand the averments on both sides as to the title to the property in dispute, and such other evidence as exists with regard to that title. On both sides it is averred, not that *Bell*, or *Bailey*, or either of them, but a gentleman named *Craven*, the owner of a very considerable estate called the *Craven Park* estate, was the predecessor in title of Mr. *Button*. When Mr. *Craven* obtained the title does not appear, but the averment on both sides is that Mr. *Craven* was the predecessor in title of the Respondent; and one of the witnesses for the Appellants, Mr. *Glass*, who gave his evidence in 1877, said that he had known the river and navigation for fifty years, and had himself been connected with the service of the trustees for forty years, and he knew Mr. *Craven* as the owner in 1836, the very year after the last of those payments was made to Mr. *Bailey*, and what is more, he never knew any one but Mr. *Craven* as the owner.

My Lords, under those circumstances, especially as the Respondent offered to produce the titles and to put the Court in full possession of whatever those titles might have shewn, and the Appellants objected, which perhaps they had a right to do, I think it is wholly impossible to infer from the evidence in the case that Mr. *Bell* and Mr. *Bailey* were owners in fee simple, having an estate or interest which would enable them to sell the fee simple of this towing-path to the trustees of the navigation, or that they did so. On the contrary, I think the inference is rather that they were merely what they are described as, that is to say, occupiers, and that it was owing to some unexplained term of an agreement made originally with Mr. *Bell* as such, that the payments, lasting so long as until 1835, were made. Whether there was any oversight, or whatever else may have been the explanation of this, at all events in that state of the evidence your Lordships cannot infer the explanation to be that they were able to sell and did sell the estate in fee simple to the trustees.

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My Lords, it is hardly necessary to refer to cases in illustration of such a matter, but I remember that something not entirely dissimilar occurred in the Court of Chancery, in a case in which there was evidence of payments not going back quite so far in point of time, the case of the *Somersetshire Coal Canal Company* v. *Harcourt* (1), and it was held to be wholly insufficient to justify any presumption that, in the circumstances of that case at all events, there had been any such sale. No doubt the circumstances of the case were in some respects different from these. I do not refer to it as an authority; I refer to it as an illustration only, shewing that payments of that kind may be made without at all warranting the inference that they are made upon the footing of proprietary rent-charge, and in purchase of the fee simple. They may be made for temporary reasons; this was a temporary payment and not a permanent payment. Therefore, I think you must come to the conclusion that there is a total failure of evidence, and that there was no purchase in this case.

But, my Lords, it does not stop there, because on the other hand there is evidence, I think unexplained and of considerable weight, to shew the assertion by Mr. *Craven* at some period within the last forty years of powers and rights over this towing-path not dependent upon any assent or permission of the trustees, and quite inconsistent with the supposition that the fee simple was vested in them and not in him. It appears that at a time, not exactly fixed, but certainly not very distant, he enlarged the wharf belonging to him along the line of the towing-path, and extended it in front of the ground then occupied by a coke oven, and in doing so he interfered with the *solum* of the foreshore where the towing-path was. He laid down heavy beams and timbers upon that *solum* for the purpose of maintaining the timbers upon the frontage of his wharf, and connecting them with his property in the coke oven yard. It does not appear that that was done *precario* and by permission of the trustees. There would have been an entry in their books if it was so, but there is no such entry, and the inference is that it was done by him as of right, and that it was acquiesced in by them, because they did not, at that time, claim to have power to prevent it. He also

(1) 24 Beav. 571; 2 De G. & J. 596; 27 L. J. (Ch.) 139, 625.

erected a wall and fence all along his land by the towing-path, and the existence of that wall and fence was by virtue of his own right of property; whether that was on the towing-path or not I do not know. I will not go into the other evidence, which is more disputed, as to the nature of his user of the towing-path, but it appears to me to be a reasonable inference from the evidence that he not only used the towing-path as he thought fit, in order to carry the produce of his coke ovens to the markets along the canal, but that he also used it when it suited his convenience for the purpose of carrying round that produce over the towing-path to the entrance to *Bailey's Lane*.

But it is not necessary that your Lordships' decision should depend upon the view you may take of the acts of possession done by Mr. *Craven* or those claiming under him. It was, as I said before, for the Appellants to make out the right they claim. In my opinion they have failed to do so, and therefore I move your Lordships that the appeal be dismissed with costs.

LORD BLACKBURN and LORD WATSON fully concurred and for the same reasons.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 27th May, 1881.

Solicitor for Appellants: *R. J. Pead.*
Solicitors for Respondent: *Davidson & Morriss.*

[HOUSE OF LORDS.]

H. L. (E.) 1881 Aug. 3.

JOHN JENNINGS . . . . . APPELLANT;

AND

EDWIN JORDAN AND JOHN PRICE . . RESPONDENTS.

Mortgage—Consolidation—Redemption Suit—Parties—Trustees—Rules of Court, 1875, *Order* XVI., *r.* 7.

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25 Ch D 51

The mortgagor of one property assigned the equity of redemption, and afterwards mortgaged another property to the mortgagee of the first. The assignee of the equity of redemption having brought an action to redeem the first property, the mortgagee claimed to consolidate the mortgages:—

Held (affirming the decision of the Court of Appeal), that the right of the purchaser of an equity of redemption cannot be affected by a mortgage created after the purchase, and that the assignee was entitled to redeem the first mortgage without redeeming the second.

Also that under Order XVI., rule 7, trustees of an equity of redemption sufficiently represent their *cestuis que trust* in a redemption suit, no direction to the contrary having been made by the Court.

Tassell v. *Smith* (2 De G. & J. 713; 27 L. J. (Ch.) 694) overruled.

Beevor v. *Luck* (Law Rep. 4 Eq. 537) commented on.

White v. *Hillacre* (3 Y. & C. (Ex.) 597) approved.

APPEAL from two orders of the Court of Appeal made respectively on the 14th of February and 5th of June, 1880 (1).

The facts and arguments are stated in the judgments of Lords *Selborne* and *Blackburn*.

June 23, 24, 27, 28. *Davey*, Q.C., and *Bompas*, Q.C. (*Townsend* with them), for the Appellant.

North, Q.C., and *Selfe*, for the Respondent *Jordan*.

Millar, Q.C., and *Gaskell*, for the Respondent *Price*.

Their Lordships took time to consider.

Aug. 3. THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the action in this case was to redeem a mortgage of certain copyhold property at *Cheltenham*, created on the 6th of

(1) *Mills* v. *Jennings*, 13 Ch. D. 639.

October, 1836, to secure £500 and interest (to which a further charge of £250 and interest was added in the following year) to one *John Merrett*. The equity of redemption, not of the whole, but of certain cottages which were part of this mortgaged property, was on the 3rd of December, 1838, settled by the mortgagor, *Thomas Tale*, for valuable consideration, on the marriage of his daughter, subject (as between *Thomas Tale* and the parties interested under the settlement) to the charge of £250, and interest thereon; and with a covenant by *Thomas Tale* to keep the settled cottages indemnified from the residue of the mortgage debt, viz., £500 and interest. The Plaintiffs (of whom the Respondent *Jordan* is the survivor) were the trustees of that settlement.

Another mortgage, upon distinct property (freehold land at *Cheltenham*), had been made in 1834 by the same mortgagor, *Thomas Tale*, to one *Middleton*, upon which (together with a further charge made in 1836) there was due, at the time of the settlement of the cottages, £500 and interest.

And on the 16th of December, 1836, the property so mortgaged to *Middleton*, and the copyhold property (other than the cottages) included in *Merrett's* security, were mortgaged by *Thomas Tale* to *John Tale*, to secure £500 and further advances, not exceeding altogether £1000, with interest thereon.

At the date, therefore, of the settlement, *Merrett's* was the only direct charge upon the cottages; but they were not redeemable separately from the rest of the copyhold property, mortgaged first to *Merrett*, and secondly to *John Tale*. And, as against *John Tale*, the mortgage of that copyhold property was not redeemable separately from the freehold, of which *John Tale* was second mortgagee, and which he was then entitled to redeem from *Middleton*.

After the settlement (on the 30th of October, 1839) *Thomas Tale* mortgaged certain other copyhold property belonging to him in *Union Street, Cheltenham*, to the same *John Tale*, to secure £400 and interest. In 1849 *John Tale's* and *Middleton's* mortgages became vested (after certain mesne assignments) in the predecessor in title of the Appellant *John Jennings;* and in September, 1857, *Merrett's* mortgage was also transferred to the Appellant's predecessor in title.

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At the hearing before *Bacon*, V.C., on the 2nd of April, 1879, the action was dismissed, not upon the merits, but because (leave to amend by adding parties having been previously given) the Vice-Chancellor thought that the persons properly entitled to redeem the mortgages vested in the Appellant *Jennings* were not all before the Court. On appeal, the Lords Justices differed from the Vice-Chancellor, and made a decree for redemption, of which the Appellant *Jennings* now complains.

I postpone the consideration of the objections to the constitution of the suit, which were urged at your Lordships' bar, and which, in my opinion, ought not to prevail. For the present, I address myself solely to the question, whether (assuming all necessary parties to have been before the Court) the decree now under appeal is right, or ought to be in any respect varied.

The Appellant *Jennings* claimed, by his pleadings, a right to consolidate, against the Plaintiffs, all his securities, including the mortgage of the property in *Union Street, Cheltenham*, originally made to *John Tale* on the 30th of October, 1839, after the equity of redemption of the cottages had become absolutely vested in the trustees of the marriage settlement of the 3rd of December, 1838. The Lords Justices held that *Jennings* was entitled to consolidate all the other mortgages, which were prior to that settlement; but that this right did not extend to the *Union Street* mortgage, and they decreed accordingly.

Upon this, which was the principal question in the cause, I agree with the Lords Justices. A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the right which (in English jurisprudence) is called "equity of redemption," may, within certain limits, and against certain persons (entitled to redeem all or some of them), "consolidate" them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all. This doctrine of consolidation is well established, and cannot now be altered except by the Legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its proper limits. There is no difficulty in its application, when all the mortgages, whether originally made to the same mortgagee, or having come into a

single hand by subsequent assignments, are redeemable at the same time by the same person. Its extension to a case in which, after that state of things has once existed, the equities of redemption have become separated by the act of the person in whom they had been combined, though it may, perhaps, be open to objection on some practical grounds, rests upon an intelligible principle. The purchaser of an equity of redemption must take it as it stood at the time of his purchase, subject to all other equities which then affected it in the hands of his vendor; of which the right of the mortgagee to consolidate his charge on that particular property with other charges then held by him on other property at the same time redeemable under the same mortgagor was one. The mortgagee cannot lose that right, because the mortgagor thinks fit to separate the equities of redemption. The two mortgages having already become virtually one, the purchaser of part of the equity of redemption is no more entitled to escape from this position, than the present Plaintiffs would have been to redeem the cottages only, without also redeeming the rest of the copyhold property included in *Merrett's* mortgage.

In the present case, the rights of redemption, existing at the date of the settlement of 1838, could not, in my opinion, have been properly worked out (unless by some voluntary arrangement between the parties interested), otherwise than by consolidating all the mortgages now vested in the Appellant *Jennings*, which were prior in their creation to the 3rd of December, 1838; as they have been, in fact, consolidated by the decree of the Court of Appeal.

I have much more difficulty in following, or satisfactorily explaining, the principle of some other authorities (such as *Beevor* v. *Luck* (1)), which have held (contrary to the decision of *Alderson*, B., in *White* v. *Hillacre* (2)) that a mortgagee's right to consolidate, as against the purchaser of the equity of redemption of property mortgaged to him, is capable of being enlarged, after the date of that purchase, by a transfer to the mortgagee of other mortgages, which were then in other hands, and with the equity of redemption of which (if there were no consolidation) the purchaser would have nothing to do.

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(1) Law Rep. 4 Eq. 537. (2) 3 Y. & C. (Ex.) 597.

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I do not, however, think it necessary or proper now to determine whether this enlargement of the doctrine has been (as some eminent Judges have thought) conclusively settled by authority. The explanation of it which has been offered is, that at the date of the purchase of the equity of redemption the doctrine of consolidation was potentially applicable to any two or more mortgages, then in existence, and redeemable by the same person (although then in separate hands), if they should afterwards come together. I cannot say that this commends itself to my mind as reasonable or equitable; but the contention of the Appellant, in the present case, goes much further. He seeks to consolidate with securities which were in existence on the 3rd of December, 1838, a mortgage of later date, on property not included in any of those securities. It is against all principle that a vendor should be enabled, after parting with his whole interest in particular property, to impose an additional burden upon it without the purchaser's consent; not by any express contract (which might in some cases prevail, if protected by a legal estate without notice), but indirectly, and without any contract at all. For my own part, I cannot conceive anything more absolutely inequitable; and there is no authority for it, unless it be *Tassell* v. *Smith* (1). If *Tassell* v. *Smith* (1) is distinguishable upon its particular circumstances, it is no authority for that proposition. If not so distinguishable, it is inconsistent with the decision of *Hall*, V.C., in *Baker* v. *Gray* (2), and of the Lords Justices in the case now before your Lordships.

The observations of Lord *Hardwicke* in *Titley* v. *Davies* (3), as to the difference between the position of *Davies*, whose mortgage from *Jenyns* was subsequent in date to the sale to *Peyton*, and that of the incumbrancers whose securities were prior to that sale, are (as it seems to me) in accordance with sound principle, and with the decisions of *Hall*, V.C., and of the Lords Justices in the present case. I cannot, therefore, regard *Tassell* v. *Smith* (1) as an authority which ought to be followed on this occasion, great as was the eminence of the Judges who decided it.

The decree, therefore, of the Court of Appeal was, in my

(1) 2 De G. & J. 713; 27 L. J. (Ch.) 694. (2) 1 Ch. D. 491.
(3) 2 Y. & C. (Ch.) 405.

opinion, right in refusing the consolidation claimed by the Appellant, so far as relates to the *Union Street* mortgage. In consolidating the other mortgages held by the Appellant, it gave effect to a claim which he had made by his pleadings, and which was never disputed by the Plaintiffs. The Appellant's counsel did not retract that claim, either before or after the judgment of the Court of Appeal; but when the decree had been drawn up, passed, and entered, it seems for the first time to have occurred to him that, unless he could consolidate all, it was not for his interest to consolidate (as against the Plaintiffs) any of his securities: the *Union Street* mortgage being (as he now suggests, though this does not appear by any evidence in the cause) the only one of his securities which is deficient, and the account being directed against him as mortgagee in possession, which he and his predecessors in title have for many years been. Something was said at the Bar about the possibility of his being able to set up the *Statute of Limitations* against the Respondent *Price* (who represents in this suit the equity of redemption in all the mortgaged property (1), except the cottages of which *Jordan*, the surviving Plaintiff, is trustee); and it was insisted, that the effect of the decree is to deprive him of the right which (if still redeemable by *Price*) he would otherwise have had, to consolidate the *Union Street* mortgage with the other securities as against *Price*, though he could not do so as against the Plaintiffs.

To avoid these apprehended results of the decision against him, the Appellant, on the 29th of May, 1880, after the decree had been formally completed, gave notice of a motion before the Court of Appeal, to "correct" that decree, by omitting the declaration contained in it that he was entitled to consolidate his other securities (prior to the settlement of the 3rd of December, 1838), with the mortgage and further charge originally made to *Merrett*; and by limiting the consequential directions to an account first, of what was due to the Appellant for principal and interest, not generally on *Merrett's* securities, but only in respect of the £250 and interest, which, under the terms of the settlement of the 3rd of December, 1838, was to be borne (as between the settlement

(1) Under a deed of the 6th of May, 1868, whereby *Thomas Tale* conveyed the equity of redemption to trustees, of whom *Price* was the survivor.

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and *Thomas Tale*) by the settled cottages; and secondly, of the rents and profits of the settled cottages only, which the Appellant or his predecessors in title, had (or without his or their wilful default might have) received. This motion was properly refused by the Lords Justices; on the ground, that what it sought was not a correction or alteration of any "slip" in the decree, but a substantial change in it, not asked for at the hearing, and contrary to what was then intended and understood by the Court and by all the parties. The present appeal is not only against the decree made on the 14th of February, 1880, but is also against the order refusing that motion made on the 5th of June, 1880; and it has been contended, at your Lordships' Bar, that the decree ought to have left it open to the Appellant to make an election, whether he would consolidate or not. Your Lordships did not think it necessary to hear the Respondents' counsel on that point; being of opinion, that, if the Appellant had ever possessed the right of election which the argument assumed, he had made his election, and was too late to retract it after judgment and decree; that the decree was (in this respect) right at the time when it was made, and could not become erroneous by reason of any subsequent change in the Appellant's view of his own interest; and that, when such a decree for consolidation had once been properly made, the parties entitled to redeem, as well as the incumbrancers, had acquired a right (of which they ought not to be deprived without their own consent) to any benefit which might result to them from it.

It is not necessary to determine, whether, under the circumstances of this case, the Appellant had a right, at or before the hearing, to take, at his election, such a decree as was asked for by his notice of motion of the 29th of May, 1880. As at present advised, I do not think that he had that right. A suit for redemption must be so constituted, in respect of parties and otherwise, and the decree made in it (unless varied by consent of all parties interested) must be such as to enable the Court to do complete justice, not only to the Plaintiffs, and the incumbrancers whom they seek to redeem, but to all other parties, before or behind them, whose redemption or foreclosure may be necessary to work out the equities of the case. To split *Merrett's* incumbrance, as

to the £500 and the £250 thereby secured, and to limit the accounts to that part only of the property included therein of which the Plaintiffs were trustees under the settlement of the 3rd of December, 1838 (as was asked by the notice of the 29th of May, 1880), would seem to be inconsistent with the principles laid down and acted upon in *Palk* v. *Clinton* (1), and *Thorneycroft* v. *Crockett* (2). If the Plaintiffs redeemed *Merrett's* securities, they were entitled also to clear that part of the property included in them, which was not included in the settlement, from *John Tale's* second mortgage of the 16th of December, 1836; and, if they did this, it would seem to follow that they were at the same time entitled to redeem all the property included in that mortgage to *John Tale*, among which was the freehold land previously mortgaged to *Middleton*.

It was the intention of the Lords Justices (as appears by the shorthand note of what passed after their judgment), that a decree should be drawn up, according to the ordinary course of the Court, for the dismissal of the action if the Plaintiff *Jordan* should not redeem the Appellant's mortgages (other than that on the *Union Street* property), and, if he should redeem those mortgages, for subsequent redemption or foreclosure (as to the property other than the settled cottages), between *Jordan* and the Respondent *Price*. With such subsequent redemption or foreclosure, *James*, L.J., said, the Appellant would have nothing to do. The decree, as actually drawn up, provides only for redemption or dismissal as between *Jordan* and the Appellant. It could not have been drawn up in that form without consent, before the Registrar, by all parties whom he considered interested, to the waiver and omission of all accounts and directions for redemption or foreclosure as between *Jordan* and *Price*. I think your Lordships must assume that those accounts and directions were, in fact, waived by such mutual consent between *Jordan* and *Price*; though it does not so appear on the face of the decree. Whether the Appellant consented to or acquiesced in such waiver, may be doubtful. In his notice of motion to alter the decree, he did not object to it on this ground, though, if he had a right to do so, the omission of such accounts and consequential directions, necessary

(1) 12 Ves. 48, 59. (2) 2 H. L. C. 239, 254, 255.

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according to the ordinary course of the Court, would have been an error, not of the Court, but of the Registrar, and might properly have been set right upon a motion of that kind. As, however, *James*, L.J., considered this to be a matter with which the Appellant had nothing to do, I think it was open to him, upon the present appeal, to object to the decree on that ground, if he could shew that he had in fact such an interest as entitled him to make the objection. If he has no such interest, it would not be according to the usual course of your Lordships' House to determine, at his instance, any question concerning the Respondents only, neither of whom has appealed. But, I think it right to say, that having regard to the position and character of both the Respondents (who represent here absent parties, for whom they are respectively trustees), I doubt whether this is a case in which the decree ought to have been drawn up in the form in which it stands, even by their consent; and I shall propose to your Lordships that certain words should be added to it, which may prevent it from becoming the occasion of future questions, and possibly new litigation, between these trustees, and parties now absent from the record.

The conclusion to which, after consideration, I have come, is, that the decree, as between the Appellant and the Respondents, is right in form as well as substance; and that the Appellant had no interest in any further accounts or directions which might properly have been added to that decree, and, consequently, that he has no title or interest now to complain of their omission.

The effect of consolidation is to make the consolidated mortgages practically one; and the right of the Plaintiff *Jordan*, if he pays what is due to the Appellant upon the account directed by the decree, to have a conveyance from the Appellant of the whole mortgaged property, is clear. Any question as to the application, as between the different estates included in the consolidated mortgages, of the rents and profits which may be charged against the Appellant in taking the account, is *res inter alios*, with which the incumbrancer, after he has been paid off, will have nothing to do. And the case is really the same, even if it should appear, upon the result of the account, that nothing at all is due to him. The Plaintiff is still entitled to the benefit of his right of redemp-

tion, and, therefore, to a conveyance of the whole property included in the consolidated securities. As against those who stand behind him, and who are entitled to redeem from him part of that property, he will have a right to charge, upon everything which is so redeemable, his costs of suit, which may be considerable. Equities of some complexity may arise in such a state of things; but they are equities to which the first incumbrancer, who will have been wholly paid off, must be a stranger. It is a fallacy to suppose that, under such circumstances, he can, in any possible event, retain a right to consolidate the *Union Street* mortgage with the securities which will have been redeemed, against the persons entitled to ulterior equities of redemption. Consolidation can only take place when there are two or more incumbrances, at the same time subsisting, united in the hands of the same incumbrancer.

The case of *Baker* v. *Gray* (1), before *Hall*, V.C., in which the decree provided for consolidation against one of the Defendants, and refused it as against others, was different from the present. There, the right to consolidate was claimed by the mortgagee, who was Plaintiff in the suit, against all the Defendants. It is clear that, in such a case, the decree might be, and ought to be, so made as to give the Plaintiff what he was entitled to against each Defendant. If he should be redeemed by a person against whom he had no right to consolidate, he must (of course) be redeemed without consolidation. But if the person to whom the right of redemption either belonged in the first place, or might afterwards come in default of redemption by those standing before him, was one against whom he had a right to consolidate, then the decree ought to be made accordingly. In the present case the Plaintiffs were persons against whom the Appellant had no right to consolidate the *Union Street* mortgage; and, if they did not redeem the other property, their action would be simply dismissed, and no question as to any posterior right of redemption could arise. If they did redeem, the securities which they redeemed would necessarily, and for ever, pass out of the Appellant's hands, and none of them could afterwards be consolidated with the other mortgage, which he retained.

(1) 1 Ch. D. 491.

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I have now to state my reasons for thinking that the objections to the constitution of the suit, which were urged at your Lordships' bar, ought not to prevail. They were four in number. The first and second were, in effect, that the ultimate equity of redemption of the mortgaged premises was not properly represented upon the record by the Respondent *Price*, who claims it as trustee of a settlement made by *Thomas Tale* on the 6th of May, 1868; on the ground that *Thomas Tale*, on the 6th of October, 1845, presented a petition to the *Bristol* Court of Bankruptcy, under the then *Insolvent Debtors Act*, and that all his interest in the mortgaged premises thereupon became vested in the official assignee of that Court; and that he also executed, on the 9th of October, 1845, an indenture, by which (if he had then any equity of redemption in the premises) he conveyed it to *John Brend Winterbotham*, in trust for *George Tale*, who had previously acquired the title of the mortgagees. The petition presented by *Thomas Tale* to the *Bristol* Court of Bankruptcy was produced from the proper custody. On the back of it the word "dismissed" is written, in the handwriting of one *Turner*, who was then an officer of the Court; and it was shewn, that such an indorsement might have been so made according to the course of that Court, when a petition was dismissed for non-prosecution; but that it could not properly have been made without the authority of the Commissioner or the Registrar. The indorsement is not signed, or even initialed, and there is no entry corresponding with it in the Registrar's book. But of the fact that this petition was never prosecuted, there can be no doubt. The order for protection, given (according to the usual course) to the Petitioner, was limited till the 7th of November, 1845, and it might then, and afterwards from time to time, have been renewed; but there was, in fact, no renewal. Nothing was ever done upon that petition beyond the initial steps necessarily and always taken in such cases; it plainly died a natural death thirty-three years before the commencement of the present action. Under these circumstances the presumption of fact is in accordance with the indorsement. The equity of redemption in the mortgaged premises, if it had for a time become vested in the official assignee, ceased to be so on the dismissal of that petition. This objection to the title of

the Respondent *Price* therefore fails. As to the deed alleged to have been executed by *Thomas Tale* on the 9th of October, 1845, it has not been produced, nor has its absence (if it was ever executed) been properly accounted for. The *Gloucestershire Banking Company*, through which the Appellant claims, was at that time sub-mortgagee of all *George Tale's* interest in the mortgaged premises; and, if this deed had been really executed, it would doubtless have been found with the other documents of title in the possession, formerly of that company, and now of the Appellant. The only evidence of its execution consists in certain entries in the books of Messrs. *Winterbotham, Bell, & Co.*, solicitors, of *Cheltenham*, who prepared a draft for that purpose, and had it engrossed, under the instructions of Mr. *Onley*, a friend of *George Tale* (then absent in *India*). If it is the necessary interpretation of the entries upon which the Appellant relied that *Thomas Tale* executed this deed on the 9th of October, 1845, they are contradicted by the law stationer's note upon the draft itself, by which it appears that it was not engrossed till the 10th of October. Mr. *John Brend Winterbotham* (the intended trustee), who was a member of the firm of *Winterbotham, Bell, & Co.*, and Mr. *Onley*, have both made affidavits, in which they state their belief that this intended deed was never executed, or in any way acted upon. A Mr. *Packwood* was the solicitor then acting for *Thomas Tale*; and if the entries in the day book of the firm ought to be understood as the Appellant understands them, they represent that, after receiving a letter from Mr. *Packwood* on the 7th of October, to the effect that *Thomas Tale* would not execute this deed, Messrs. *Winterbotham & Co.* on the same day persuaded him to do so, and (on the next day but one) attended him and took his execution of it. Mr. *Winterbotham* says (I think justly) that it would have been a professional irregularity for him so to take the execution of the deed by Mr. *Packwood's* client. He never himself executed that deed, and he believes that the day book entry, "Attending Mr. *T. Tale*, executing deed" (from which, doubtless, the similar entries in other books were transferred), ought to have been, "Attending Mr. *T. Tale as to* executing deed." The entries in these books would not be evidence at all, apart from the evidence of Mr. *Winterbotham*; and, if taken in connec-

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tion with what Mr. *Winterbotham* says, they certainly do not establish the execution of the deed, the burden of proving which rested upon the Appellant.

The title, therefore, of the Respondent *Price* is not displaced, either by the petition in insolvency, or by the supposed deed of the 9th of October, 1845.

The next objection was, that the *cestuis que trust* of *Price* under the settlement of the 6th of May, 1868, ought to have been brought before the Court. Having regard, however, to Order XVI., rule 7, of the Supreme Court of Judicature, I think that *Price* sufficiently represented his *cestuis que trust* for the purposes of this suit, no direction having been given by the Court to the contrary.

The last objection related to the absence from this record of the assignee in bankruptcy of *George Tale*, from whom the title of the *Gloucestershire Banking Company* was originally derived, by way of sub-mortgage, and who afterwards, before the sale and transfer by the *Gloucestershire Banking Company* to *William Jennings* (the Appellant's predecessor in title), in February, 1849, became bankrupt. The action was commenced more than twenty-seven years after the date of that transfer; and neither in his pleadings, nor (as your Lordships were informed by Counsel at the bar) before either of the Courts below, was any objection made by the Appellant to the constitution of the suit, on the ground that the assignee in bankruptcy of *George Tale* had, as between himself and the Appellant, a subsisting equity of redemption, in respect of which he ought to have been made a Defendant. There is no trace of any such point having been argued before the Court of Appeal. The Appellant may well be conceived to have had reasons for not taking any such objection. If it had been taken in due time, the Plaintiffs might have been able, without difficulty, to meet it. Whatever might have been its weight, if sooner taken, I think it would be against sound principle, and contrary to the practice of your Lordships' House, now to give effect to it.

It only remains for me to add, that I would propose to your Lordships that the decree appealed from should be varied, by reserving liberty for the Respondents, or either of them, or for any of the *cestuis que trust* under the deeds of the 3rd of December, 1838, and the 6th of May, 1868, respectively (in case of

redemption of the mortgaged premises included in the decree by the Respondent *Jordan*), to apply to the Chancery Division of the High Court of Justice for the addition to the decree of any further accounts and directions consequential thereon, which, by reason of such redemption, the Court may think just. I do not consider that this variation in the form of the decree (in which the Appellant has no interest) ought to affect the costs of the appeal. I therefore move your Lordships that, subject only to that variation, the decree be affirmed; and that the Appellant pay the costs of the appeal.

LORD BLACKBURN:—

My Lords, in this case *John Mills*, since deceased, and the Respondent *Jordan* instituted an action against *Jennings*, to redeem certain property which had been mortgaged by *Thomas Tale* in 1836 and 1837 to *John Merrett*, which mortgage had been transferred to *Jennings*, and into possession of which he or his predecessors had entered. And the Plaintiffs, in their statement of claim, shewed that *Thomas Tale*, by a deed of settlement made on the marriage of his daughter on the 3rd of September, 1838, conveyed to trustees, for the husband and wife, the equity of redemption of a portion of the property comprised in the two mortgages to *Merrett* of 1836 and 1837, and they shewed that the title of those trustees had by mesne assignments vested in the Plaintiffs, and they asked to have the usual accounts taken, and to redeem on payment of what was due. *Jennings*, by his answer, set up a claim to consolidate with the mortgage to *Merrett* mortgages of another piece of land made by *Thomas Tale* to *John Middleton* in August, 1834, and February, 1836, a charge in favour of *John Tale* created by deed of December, 1836, by which *Thomas Tale* charged the property comprised in *Middleton's* mortgages, and also a portion of the property comprised in *Merrett's* mortgage, but not comprised in the settlement of 1838, and a mortgage of some property in *Union Street*, made in 1839 by *Thomas Tale* to *John Tale*. This *Union Street* property was not comprised in either the mortgage to *Merrett* or the settlement of 1838. All those charges had been united by various mesne conveyances in *Jennings*. And he claimed to consolidate all those mortgages and securities.

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Before *Bacon*, V.C., the Plaintiffs did not dispute that the Defendant was entitled to consolidate the mortgages and securities made before the settlement of 1838, but contended that he had no right to consolidate those made subsequent to the date of the settlement of 1838. The Vice-Chancellor, without deciding this question, held that the Plaintiffs ought to join, as necessary parties, those who had the equity of redemption in the mortgages and securities which it was conceded that the Defendant was entitled to consolidate. And the objection being pressed, he said that the action must be dismissed unless it was done, but gave leave to amend by adding parties or otherwise.

The writ was accordingly amended by adding the name of *John Price* as a Defendant, and in the statement of claim, besides other amendments, was inserted a prayer, "that it may be declared that the Defendant, *John Jennings*, is not entitled to consolidate as against the Plaintiff any mortgages of the said *Thomas Tale*, made subsequent to the date of the said settlement of the 3rd of December, 1838."

The Defendant *Jennings*, by his amended statement of defence, "submits and insists that he can consolidate and is entitled to consolidate as well the mortgages or securities made subsequently as those made previously to the said settlement." The Vice-Chancellor pronounced no opinion upon this question. The proof that *Price* was the proper party consisted in shewing that he was the survivor of two trustees, to whom in 1868 *Thomas Tale* conveyed all that he then had. And it was proved that in 1845 *Thomas Tale* had presented a petition for protection from process, and under 5 & 6 Vict. c. 116, s. 1, all his property vested in the official assignee for the time being. And though by 7 & 8 Vict. c. 96, s. 10, on such petition being dismissed all such property revests in the Petitioner, it was said that there was no evidence here that the petition ever had been dismissed. A draft of an assignment by *Thomas Tale* to *John Brend Witherbotham* was produced; and it was contended that the assignment had been executed in October, 1845, by *Thomas Tale*. The dates and the nature of the transaction look most suspiciously as if a fraud upon the Court of Bankruptcy had been in contemplation, but nevertheless if the instrument had been executed it would

have been valid against *Thomas Tale*. The Vice-Chancellor thought that it was proved that the assignment had been executed, and on that ground dismissed the action. The Court of Appeal, however, came to an opposite conclusion of fact, and thought that the instrument was not proved to have been executed. I do not think it necessary to say more than that I quite agree with them. And as to the evidence of the dismissal of the petition, it appears that the petition was presented, and an interim protection order till the 7th of November, 1845, granted, and that day was fixed for the further examination of the Petitioner. On that day it appears, by the Registrar's book, that the solicitor who was employed for the petition was present for other petitions, but there is no entry whatever as to this petition. When no one appeared either for the Petitioner or for the creditors the natural and proper course for the Commissioner was to dismiss the petition. He might, if the case appeared to make it proper, adjourn the case to a future day, or adjourn it *sine die*. But though there is no entry in the Registrar's book that the petition was dismissed, there is, on the back of the petition, in what is proved to be the handwriting of a deceased officer of the Court, written the word "dismissed," and during the thirty-five years that have since elapsed nothing has ever been done on it. I think this amply justified the conclusion to which the Court of Appeal came, that the property had revested in *Thomas Tale* before he executed the assignment of 1868.

The Court of Appeal had then to determine the question whether the position contended for by the Plaintiff in his amended statement of claim before quoted, or that contended for by the Defendant, truly represents the law of *England* as administered in the Courts of Equity.

Tassell v. *Smith* (1), a decision by two very experienced equity lawyers, *Knight Bruce* and *Turner*, L.JJ., in 1858, was relied on. And the question for the Court of Appeal was, whether this decision was right, or at least was binding upon them. They decided the question in favour of the Plaintiff; and the first and most important question brought before the House is whether that decision was right. I do not think it important to inquire whether

(1) 2 De G. & J. 713; 27 L. J. (Ch.) 694.

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the Court of Appeal was bound by the decision of the Lords Justices as being a Court of co-ordinate jurisdiction, for this House certainly is not so bound.

The Court of Appeal had not to inquire whether the Defendant had or had not a right to consolidate the earlier mortgages, nor, as I apprehend, is any question on that now before this House. Should any one hereafter contend that the Plaintiff's counsel conceded more than he was bound to do, the decision of the Court of Appeal will not stand in his way, though other decisions may. I take it that the only question before this House is, whether, where the mortgage on one property is not created till after the equity of redemption in the other property has been parted with, there is, as against the purchaser, an equity to consolidate the two.

And I do not think it conclusive that the alleged equity was one which, if the matter were *res integra*, could not be maintained, nor even that it was such as, in the name of equity, would work injustice. Some of the rules acted on in the Courts of Equity, in the kindred subject of tacking securities on the same property, are founded upon this, that a mortgage, after the time specified for redemption had expired, was an absolute estate, which no doubt it was at law, and that the equity of redemption was only a personal equity to take away the legal estate from him in whom it was vested, which perhaps it originally was. It would seem that now after for a very long time equitable estates have been treated and dealt with as to all other intents estates, any rules founded on the antiquated law ought to be no longer applicable, and that *cessante ratione cessare debet et lex;* but some rules apparently founded on this antiquated law have been so uniformly and long acted upon that they must be treated as still binding. And the rule first laid down in *Marsh* v. *Lee* (1), that if there was a subsequent mortgagee (who, as the legal estate was in another, could only be a mortgagee of the equity of redemption), but whose claim being prior in time to that of a third mortgagee would be satisfied before that of the third mortgagee, yet if the third mortgagee acquired the legal estate even with full knowledge of the existence of the second mortgage, he should be entitled to squeeze out the second

(1) 2 Vent. 337.

mortgage. In *Brace* v. *Duchess of Marlborough* (1), in 1728, the Master of the Rolls thought the rule of equity was so settled, "not, however, without great appearance of hardship; for still it seems reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money that the land was of sufficient value to pay the first mortgage, and also his own; to be defeated of a just debt by a matter *inter alios acta*, a contrivance between the first mortgagee and the third, is great severity."

Yet notwithstanding these, as it seems to me, unanswerable objections to the rule, he considered it established. And in *Wortley* v. *Birkhead* (2) Lord *Hardwicke* intimates, I think pretty plainly, that if it were then to be settled for the first time he would have decided the other way, but that it was settled; and in *Titley* v. *Davies* (3), A.D. 1743, he acted upon it; and now, after the lapse of nearly a century and a half more, I think only the Legislature can do away with this rule, which, however, does not apply to this, which is not a case of tacking, or gaining priority for a puisne incumbrance on the same property, but a case of consolidating incumbrances on two different properties.

But though a rule, even though it works what is not justice, may be established by a long series of decisions to be the rule of equity, yet when it is alleged that a rule, producing such a lamentable result exists in a particular case, the burthen of proof lies strongly on those who assert it to shew that it is established either by decided cases, or by evidence of such a long continued practice as shews that there are not cases only because the rule has never been disputed.

And though I cannot doubt that the Lords Justices thought that the rule on which they acted in *Tassell* v. *Smith* (4) was already established, and though it is reasonable to suppose that two Judges who had such long and great experience in Courts of Equity had grounds for so thinking, yet the discussion at your Lordships' bar has convinced me that they made a mistake.

The earliest case cited is *Pope* v. *Onslow* (5). In *Ex parte*

(1) 2 P. Wms. 491, 492.
(2) 2 Ves. Sen. 571.
(3) 2 Y. & C. (Ch.) 399.
(4) 2 De G. & J. 713; 27 L. J. (Ch.) 694.
(5) 2 Vern. 286.

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King (1), before Lord *Hardwicke* in 1750, that case was cited as establishing that where *A.* had two mortgages upon different independent estates of the mortgagor, one a deficient security and the other more than sufficient, the mortgagor should not redeem the last without making good the deficiency of the other security; but the Lord Chancellor said that he was not satisfied that this was the established rule of the Court. Both *Hall*, V.C., in *Baker* v. *Gray* (2), and *Cotton*, L.J., in the present case, say that Lord *Hardwicke* afterwards changed his opinion. I suppose they are right, though I have not been able to discover the case in which he said so. I have read *Titley* v. *Davies* (3) with attention, and it seems to me that Lord *Hardwicke* there thought that *Titley*, having an equitable mortgage on one portion of property mortgaged to *Shepheard*, had a right, as against *Shepheard* and all who claimed under him, to redeem the whole property; and that then, having done so, *Titley*, who had the legal estate in the whole, had got a right, as against both *Shepheard* and those who claimed under him, to retain the whole till paid off his equitable mortgage, though only on the part. This, like *Brace* v. *Duchess of Marlborough* (4), may be unquestionable equity, though, to say the least, questionable justice, but, as it seems to me, has nothing to do with consolidation, and indeed *Ex parte King* (1) was subsequent in date to *Titley* v. *Davies* (3).

It is not, however, I think, important whether Lord *Hardwicke* changed his opinion or not, if, as I think is the case, the rule, as far as laid down in *Pope* v. *Onslow* (5), has, since Lord *Hardwicke's* time, been recognised as the settled rule in equity.

In *Willie* v. *Lugg* (6), in the year 1761, the Lord Chancellor (Lord *Northington*) said that the principle upon which the Court proceeds continued as long as the equity of redemption remains united; but, he said, "there seems also a manifest distinction between this case and the case of a purchase subject to a mortgage, for there the purchaser acquires a right to redeem that particular mortgage, and when he comes to redeem he offers to equity to pay all that his estate is a debtor for." Certainly Lord *Northington*

(1) 1 Atk. 300.
(2) 1 Ch. D. at p. 494.
(3) 2 Y. & C. (Ch.) 399.
(4) 2 P. Wms. 491.
(5) 2 Vern. 286.
(6) 2 Eden, 78.

was not of opinion that the equity subsequently laid down in *Tassell* v. *Smith* (1) then existed.

In *Jones* v. *Smith* (2), in 1794, Lord *Alvanley*, then Sir *Pepper Arden* and Master of the Rolls, says:—"*Pope* v. *Onslow* (3), followed by two modern cases, has settled the point that, as against the mortgagor or his assignee, and, therefore, I must suppose, against all the creditors, if there are two legal mortgages which at law are become absolute (for that must be the principle) the mortgagee shall insist on being redeemed as to both or neither."

The two modern cases, which he cites from the Registrar's book, are *Cator* v. *Charlton*, 21st June, 1775 (I suppose decided by Lord *Bathurst*), and *Collet* v. *Munden* in 1786, decided by Lord *Kenyon* on the authority of the first. In *Cator* v. *Charlton*, as stated by Lord *Alvanley*, the different mortgages were all made whilst the mortgagor was owner of the equity of redemption of the whole; and it was insisted that the Plaintiff, who afterwards purchased the equity of redemption, had at the time of his purchase notice of the other mortgages.

In *Ireson* v. *Denn* (4), A.D. 1796, just two years after *Jones* v. *Smith* (2), Lord *Alvanley* is reported to say, "He did not know why such a rule was ever laid down, but it had been decided by many cases that a mortgagee of two distinct estates upon distinct transactions from the same mortgagor was entitled to hold both, even against the purchaser of the equity of redemption of one of the mortgaged estates without notice of the other mortgage, until payment of the whole money due on both mortgages."

But the case before him, like the cases which he mentions in *Jones* v. *Smith* (5), was a case of two mortgages made to the same person whilst the equity of redemption belonged to the same person, who afterwards assigned the equity of redemption in one of the estates. Even if it was established that in such a case the right to consolidate would be good against the assignee, it does not seem to me to follow that it would be good against an assignee of the equity of redemption of one of the estates made whilst the two mortgages were not yet vested in the same person, still less as against one made before the mortgage of the other estate existed.

(1) 2 De G. & J. 713; 27 L. J. (Ch.) 694.
(2) 2 Ves. jun. 372, 376.
(3) 2 Vern. 286.
(4) 2 Cox, 425.
(5) 2 Ves. jun. 372.

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The next reported decision is that of *White* v. *Hillacre* (1), before *Alderson*, B., sitting in equity. The facts, as stated in the judgment, were that *James Hillacre* mortgaged *Madgeon*, and died leaving the equity of redemption to *Thomas Hillacre* in fee; at that time the mortgage was vested in *Clark*, and so continued till after *Thomas Hillacre's* death in 1815. Then *Thomas*, who was owner in fee of *Westhay*, mortgaged it to *Clitsome* in 1812. In 1815 *Thomas* died, and devised *Madgeon* to one set of devisees, and *Westhay* to another. "This," says *Alderson*, B., "being the state of facts, *Clark* in 1816 assigns to *Clitsome* the mortgage on *Madgeon*, and then, for the first time, the two mortgages are united in one person. I am of opinion that the Plaintiff has no right to tack" (consolidate) "under these circumstances. The right seems to have been established upon this principle, that where a mortgagee is in possession of the legal estate in two properties as a security for money lent on them, a Court of Equity will not allow the person entitled to the equity of redemption to redeem either unless he redeems both, and allows the mortgagee a lien on the whole for his whole debt. But this principle manifestly cannot apply to a case where the equity of redemption belongs to different persons. Here that is so, and these persons, though volunteers as it is said, became entitled under *Thomas Hillacre's* will, before the assignment of the mortgage on *Madgeon* was made to *Clitsome*." Notwithstanding the observations of Lord *Hatherley* in *Beevor* v. *Luck* (2), I must own that Baron *Alderson's* judgment has an appearance at least of good sense, and of furthering justice, or perhaps I should say of refusing to further injustice, that to my mind is very persuasive. It is not, however, necessary in the present case to form any opinion on this point.

White v. *Hillacre* (3) was not cited in *Tassell* v. *Smith* (4), which is to be lamented, for if it had the Lords Justices would have no doubt explained why and how it was just that the purchaser of the equity of redemption of *Blackacre* should be under any obligation to fulfil the equities which his vendor had, after the sale, become liable to fulfil in respect of *Whiteacre*, with which the purchaser of the equity of redemption of *Blackacre* never had anything to do,

(1) 3 Y. & C. (Ex.) 597, 608.
(2) Law Rep. 4 Eq. 537.
(3) 3 Y. & C. (Ex.) 597.
(4) 2 De G. & J. 713; 27 L. J. (Ch.) 694.

for this does not, I think, evidently follow, even if it was settled that if the two mortgages had been united before the sale of the equity of redemption, so that the vendor was then liable to fulfil them, that equity should prevail. And if, as is very likely, they had said that the objections to this were not stronger than those against tacking stated in *Brace* v. *Duchess of Marlborough* (1), but that long settled rules ought not to be departed from, they would have had to consider whether there was any settled rule, or, indeed, any decision at all, that the purchaser of *Blackacre* was under any obligation to fulfil an equity of his vendor in respect of a debt first incurred after the sale of *Blackacre* though secured on *Whiteacre*, which might not even have been the property of the vendor at the time of the sale of the equity of redemption. All that appears in the report to have been said by *Turner*, L.J., is, that "one who comes to redeem a security cannot do so without redeeming any other security which the Defendant holds upon property of his." He does not notice that the estate which the vendor pledged after he had sold the equity of redemption could in no natural sense of the words be called the property of the purchaser. And he cites no authority to shew that an artificial rule was established by which it was to be treated as his. *Hall*, V.C., in *Baker* v. *Gray* (2), searched for such an authority, and found none. The Lords Justices in the present case could find none. The very experienced counsel who argued for the Appellant at your Lordships' Bar could find none but those on which I have already commented. And of those it seems to me that what is said by Lord *Alvanley* in *Ireson* v. *Denn* (3) is the only authority prior to *Tassell* v. *Smith* (4) that has any bearing on the case, and that, I think, does not go so far as is required. I think that the doctrine of consolidation of mortgages ought not to be carried further than it has been, and that *Tassell* v. *Smith* (4) did, at least as far as regards a mortgage made on another property, after the equity of redemption in the first mortgage had been parted with, carry it further than ever had been done before, and should not be followed.

The decree was made as it was asked for by the Defendant, and

(1) 2 P. Wms. 491.
(2) 1 Ch. D. 491.
(3) 2 Cox, 425.
(4) 2 De G. & J. 713; 27 L. J. (Ch.) 694.

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not objected to by the Plaintiff, consolidating the mortgages prior to the settlement of 1838. After it had been drawn up as the parties asked, and as the Court meant it to be, the Defendant found reason to fear that he had, under the belief that it was for his benefit, asked for a consolidation which it would have been more prudent for him not to ask for. And he sought to set aside the whole proceedings and make the Plaintiff redeem only *Merrett's* mortgage, as the Plaintiff originally asked, not on the ground that there had been any mistake on the part of either himself or the Court, but because he feared he had been injudicious. I think he should have thought of all this before, and that the Court of Appeal properly rejected his application.

There remains only the question whether the order to carry out the decree of the Court of Appeal requires amendment.

The Appellant has not, I think, anything of which to complain. The order as it stands does not subject him to anything to which he ought not to be liable; or deprive him of anything to which he is entitled. But, as it is possible, though I think not probable, that the state of the accounts may turn out to be such that those who are beneficially interested in the equities of redemption of the different properties may require some further protection, I agree that the order should be varied as proposed. I entirely agree that this variation should make no difference in the costs.

LORD WATSON:—

I am of the same opinion with your Lordships upon all the questions raised in this appeal; and these have been so fully dealt with by your Lordships that it is not necessary for me to refer to them in detail.

Upon the most important of these questions—that which concerns the right of the Appellant to consolidate, as against the Plaintiffs, the mortgage of the 30th of October, 1839, I have a single word to say. The principles of equity as settled in the law of *England* are generally such as commend themselves at once, even to minds unfamiliar with that law; but I must confess that in the present case I have been unable to apprehend or appreciate the equitable considerations upon which the doctrine of consolidation of mortgages, as now established, must be supposed to

rest. The doctrine appears to me to have its root in equity. If *A.* has separately mortgaged two estates to *B.*, it seems to be just and reasonable that a Court of Equity should decline to aid *A.* in redeeming one of these estates, except upon condition of his paying to *B.* the other mortgage debt, which might be insufficiently secured. But the equitable character of the considerations which have led to the growth and the development of the doctrine, as against purchasers of the mortgagor's equity of redemption, is by no means so apparent. It was argued that the doctrine has now been carried, by authoritative decision, to this limit,—that the purchaser of the equity of redemption is affected, not only by rights to consolidate actually existing at the date of his purchase, but by rights which were not *in esse* at that time. How far that proposition is well founded, it does not appear to me to be necessary to determine, because the Appellant cannot succeed, upon this part of his case, unless he can carry the doctrine beyond that limit. He must shew that the right of the purchaser of the equity of redemption ought to be affected by claims to consolidate arising out of acts of the mortgagor subsequent to its sale. My Lords, I am unable to understand upon what principle a vendor should be permitted to deal with and impose burdens upon an estate which has ceased to be his; and there being no authority to support the Appellant's contention, except it may be the case of *Tassell* v. *Smith* (1), I think that contention is unsound.

Order of the Court of Appeal of the 14*th of February,* 1880, *varied, by reserving liberty for the Respondents, or either of them, or for any of the* cestuis que trust *under the deeds of the* 3*rd of December,* 1838, *and the* 6*th of May,* 1868, *respectively* (*in case of redemption of the mortgaged premises included in the Order by the Respondent* Jordan), *to apply to the Chancery Division of the High Court of Justice for the addition to the Order of any further accounts and directions consequential thereon, which by reason of such redemption the Court may think just: Orders com-*

(1) 2 De G. & J. 713; 27 L. J. (Ch.) 694.

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plained of in the appeal, subject to the above-mentioned variation, affirmed with costs: Cause remitted to Chancery Division.

Lords' Journals, 3rd August, 1881.

Solicitors for Appellant: *Bompas, Bischoff, & Dodgson*, for *E. & E. L. Waugh & Musgrave, Cockermouth.*

Solicitors for Respondents: *Waterhouse & Winterbotham*, for *Winterbotham, Bell, & Co., Cheltenham.*

[HOUSE OF LORDS.]

1881
June 14.

THE LONDON AND COUNTY BANKING COMPANY (LIMITED) . . . . . } APPELLANTS;

AND

THOMAS RATCLIFFE . . . . . RESPONDENT.

Mortgage—Deposit of Title Deeds with Bank—Banker's Lien—Loan by equitable Mortgagee after notice of Contract of Sale—Vendor and Purchaser—Lien of Unpaid Vendor.

The owner of land, after depositing the title deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted with the knowledge of the bank to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account at the bank sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that on the principle of *Clayton's Case* (1 Mer. 585) that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money by instalments to the vendor:—

Held, affirming the decision of the Court of Appeal, that on the principle of *Hopkinson* v. *Rolt* (9 H. L. C. 514) the bank had no charge on the land as against the purchaser for the fresh advances:

Held, also, that the bank had no charge upon the purchase-money:

Per LORD BLACKBURN:—A purchaser of land, with notice that the title deeds have been deposited with a bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the

bank has after notice of the purchase made fresh advances. The burden lies on the bank advancing on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends so to do.

APPEAL from an order of the Court of Appeal (1).

The action was brought against the Respondent by the Appellants as equitable mortgagees of certain hereditaments at *Earleigh*, the conveyance of which to *J. W. Batten*, the vendor, who was a customer of the bank, had been deposited by him with the bank as a security for the payment of his then overdrawn account, and for all money which should at any time be due from him to the bank on the general balance of his account. *Batten*, with the knowledge of the bank, contracted to sell his property to the Respondent, who employed the vendor's solicitor to prepare his conveyance, and afterwards paid or accounted for the purchase-money to the vendor. The vendor continued to deal with the bank, but ultimately became bankrupt, with a large balance to the debit of his account. The facts were complicated, but will sufficiently appear, with the arguments, from the judgments of Lords *Selborne* and *Blackburn*. The action was tried before *Bacon*, V.-C., who held that the rule in *Clayton's Case* (2) had no application, and by his order, dated the 10th of May, 1879, declared that the security of the bank was paramount to the title of the Respondent, and that the Respondent was a trustee of the premises for the bank, and gave consequential relief founded upon such declaration.

The Court of Appeal on the 24th of March, 1880, reversed the Vice-Chancellor's decision, considering the case to be within *Hopkinson* v. *Rolt* (3), and the rule in *Clayton's Case* (2) to be applicable, and dismissed the action with costs.

May 19, 20, 23. *Benjamin*, Q.C., *Davey*, Q.C., and *Russell Roberts*, for the Appellants.

John Pearson, Q.C., and *Horton Smith*, Q.C. (*Ingle Joyce* with them), for the Respondent.

Davey, Q.C., replied.

(1) Not reported.

(2) 1 Mer. 585.

(3) 9 H. L. C. 514.

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1881

LONDON AND COUNTY BANKING COMPANY v. RATCLIFFE.

Their Lordships took time to consider.

June 14. THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, the Appellants in this case claim under an equitable mortgage of certain real estate at *Earleigh*, near *Reading*, given to them by one of their customers named *Batten*, to secure the then present and future general balance of his banking account with them. The conveyance of that estate (from a vendor to him named *Spokes*) was deposited by *Batten* with the bank; the purpose of the deposit being declared by a memorandum in writing, dated the 17th of January, 1873, by which *Batten* engaged to give the bank, whenever required, legal mortgages of this (and, as I collect, of other properties, the deeds or documents relating to which were also at the same time deposited); and declared, that the security should not be considered satisfied by the payment or liquidation of any sums to be thereafter from time to time due on the balance of the account, but should extend to cover all future sums which should at any time be or become due. This memorandum was afterwards cancelled, and another security, in the same terms (except the date, and an unimportant variance in the description of part of the property), was signed in lieu of it, and was given by *Batten* to the bank, on the 17th of June, 1874. One of the questions in the case might be, whether this cancellation and substitution of 1874 did not put an end to the security of 1873, under which alone the Appellants could be entitled to make any claim against the Respondent. But I prefer to consider the case upon its merits, as if no such cancellation or substitution had taken place.

On the 28th of April, 1873, an agreement in writing was signed by *Batten*, and by the Respondent (his brother-in-law), for the sale by *Batten* to the Respondent of part of the real estate at *Earleigh*, comprised in the conveyance deposited with the bank. The purchase-money (£3200) was treated as divisible into three sums; £1500 for one part, called "*Canterbury Villas*;" £900 for another part, called "*Woodbine Villas*;" and £800 for the remaining part, called "*Twyford Villas*." A deposit of £25 was paid, and the 24th of May, 1873, was fixed for payment of the rest of the purchase-money, and for conveyance and completion of the

purchase, possession to be given to the purchaser as from that date. *Batten* agreed, in the ordinary way, to make a good title, which would, of course, be a title free from incumbrances, and he was to retain all deeds and documents in his possession relating to any property other than that sold to the Respondent, covenanting in the usual way for their production. The effect of this last stipulation was, that the Respondent, as purchaser, could not claim the possession of the deed of conveyance from *Spokes*, which had been deposited with the bank, and which related to other property, as well as to that sold to him. In addition to the terms embodied in this agreement of the 28th of April, 1873, it was also stipulated between *Batten* and the Respondent (by letters which passed between them) that two debts, then due from *Batten* to the Respondent and the Respondent's wife, for sums exceeding together £800, should be set off against the purchase-money of £3200.

The Appellants and the Respondent had respectively notice, the former of the contract of sale from *Batten* to the Respondent, the latter of the Appellants' security of the 17th of January, 1873. The contract and the notice of it to the Appellants were (or may for the present purpose be treated as having been) contemporaneous. The amount then due to the Appellants on the balance of their banking account with *Batten* was £1779 6*s.* 7*d.* and of this the Respondent must be deemed to have had notice. The contract, so far as relates to *Canterbury Villas*, was completed, by conveyance and payment of the £1500 apportioned to that part of the property, on the 28th of May, 1873, with the Appellants' knowledge, who received £1100 (part of this £1500) on the 6th of June from *Batten's* solicitor, the remaining £400 being received, without objection from the Appellants, by *Batten* himself. Another conveyance in fee simple of all the rest of the property agreed to be sold was also at the same time executed, and was left with *Batten's* solicitor until the rest of the purchase-money should have been paid (as it eventually was, in several instalments) by the Respondent to *Batten*. The latest of these payments was made on the 11th of March, 1876, after which the conveyance from *Batten* was delivered up to the Respondent. The Appellants had no notice of the execution of this conveyance,

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or of any of the payments made by the Respondent to *Batten* in respect of the property comprised in it, until some time after the last payment.

Under these circumstances it results from the decision of your Lordships' House, in *Hopkinson* v. *Rolt* (1), that, as against the title of the Respondent, the purchaser, under the contract of the 28th of April, 1873, no further charge on the real estate comprised in that contract could be created in addition to the balance of £1779 6*s.* 7*d.* at that time due by any subsequent advances which the bank might make to *Batten*. Nor can I discover anything in the nature or terms of the Appellants' security of the 17th of January, 1873, to prevent the extinction of that debt of £1779 6*s.* 7*d.* due on the 28th of April, 1873, by means of payments afterwards made by *Batten* to the general credit of his banking account, upon the principle of *Clayton's Case* (2). In point of fact those payments were, before the end of the same year 1873, more than sufficient to extinguish the whole of that debt; and although, in the continuation of the account, there was always a considerable balance due to the bank, the whole debt, subsequent to 1873, was for advances later than the 28th of April, 1873. The continued possession by the Appellants of the deed of conveyance from *Spokes* to *Batten* (relating, as it did, to other property besides that sold to the Respondent), makes, in my opinion, no difference in the case.

Upon the statement of claim in the action, the Appellants' case appears to me to be rested on grounds inconsistent with the decision in *Hopkinson* v. *Rolt* (1). But a different view was presented in the argument at your Lordships' bar, which it is now necessary to consider, and which I assume to be open to the Appellants, notwithstanding the form of their pleading. It was insisted that the security of the 17th of January, 1873, extended to every interest which *Batten*, the mortgagor, had, or at any time during its continuance might have, in any part of the land to which the deposited deed of conveyance related; that although by the contract of sale it necessarily became limited, as to the land itself, to the debt of £1779 6*s.* 7*d.* then due (and which was afterwards paid off), it continued operative against the

(1) 9 H. L. C. 514. (2) 1 Mer. at p. 585.

purchase-money payable under that contract to *Batten*, so as to bind that purchase-money (except the £400 paid with the Appellants' knowledge) by all the subsequent advances from time to time made; that the Respondent was bound to inquire, whether there were or were not any such subsequent advances, before he could be discharged from any part of the purchase-money by any payment to *Batten*; and that, having failed to make such inquiry, he is now liable to pay the money over again to the Appellants, to the full extent to which advances were actually made.

The result of the Appellants' contention is, to ascribe to the contract for sale of the 28th of April, 1873 (with the notice which they had of it) the effect of dividing what was before a single mortgage security, operating upon one subject and for one debt, into two distinct securities, operating upon different subjects,—upon one, for a present debt, and upon the other, for a merely possible future liability. The original security was the land, the debt secured was such balance as might happen to be due whenever the security should be put in force. But after the 28th of April, 1873, the real estate (according to this argument) continued to be a security only for the amount then due; and at the same time the personal debt from the Respondent to the mortgagor, which had then for the first time come into existence, and the vendor's lien for that debt, became a security for all those future advances by which the real estate could be no longer bound.

I agree with the Lords Justices in thinking that any such prospective division of the security, any such mortgage of a subject not then in existence for further advances which the Appellants were under no obligation to make, was not within the contemplation of the parties to the memorandum of the 17th of January, 1873, nor really within the scope of that instrument. When the mortgagor exercised, with notice to the mortgagee, the right which (according to *Hopkinson* v. *Rolt*) (1) he undoubtedly possessed of selling the mortgaged estate, subject to the then existing charge of the bank, and making his own bargain with the purchaser on his own terms, and in his own way, without any concurrence of the bank, a line was, in my opinion, drawn, which

(1) 9 H. L. C. 514.

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was applicable to the security as a whole; and the bank could not make further advances so as to prevent or intercept (without any new agreement with *Batten*, or any notice to the Respondent beyond that which he had of the original security) the fulfilment, in the ordinary course, of the terms of the contract between *Batten* as vendor and the Respondent as purchaser. If the Respondent had bought a mere equity of redemption, subject to the Appellants' charge, and had paid off that charge, it seems to me to be quite impossible to contend that he would not have been at liberty to pay the balance of the purchase-money to his vendor without making any inquiry as to subsequent advances by the Appellants. If it were otherwise, he could not be entitled, without the Appellants' consent, to stipulate (as he did) that pre-existing debts, due to himself and his wife from *Batten*, should be set off against the purchase-money. It makes (in my judgment) no difference, that, by the terms of this contract, it was *Batten's* duty, as between himself and the Respondent, to clear the estate sold from the Appellants' incumbrance. In point of fact, he did so; and, indeed, he did more: the sums paid by him from time to time into the bank, after the date of the contract, exceeded the whole amount of the purchase-money received by him, from first to last, from the Respondent. This would (no doubt) be immaterial to the present controversy, if the Appellants had the rights which they claim; for they received those moneys (except the £1100 paid on the 6th of June, 1873), from *Batten*, without knowing from what source they came. But, from the terms of the Respondent's contract, of which the bank had notice, the fair and reasonable inference was, that the settlement of the purchase-money was intended to, and would, take place, according to the ordinary course between vendor and purchaser, that is by payment to the vendor, subject to his obligation to clear the title from the then existing charge. Notice to the Respondent of the security of the 17th of January, 1873, was notice of the existing charge; but it was not notice that, after the amount of that charge had been fixed once for all, as against the land, by the sale of the estate, further advances, which the Appellants were under no contract or obligation to make, would voluntarily be made by them to *Batten*, much less that such advances would be made

upon the footing of an equitable assignment to the bank of the unpaid purchase-money. Until these advances were actually made there was not, and there could not be, any existing charge for them; and even if such a charge arose as between *Batten* and the bank, when they were in fact made, this was not a charge of which notice by anticipation can be imputed to the Respondent, or into the existence or non-existence of which he was bound to inquire. It was for the Appellants, when those facts happened which (in their view) resulted in such a charge, to give notice of it.

A question not dissimilar to this arose, and was decided by this House, in the case of *Shaw* v. *Foster* (1) to which Mr. *Davey* referred in his reply. There *Pooley* had contracted with *Foster* to purchase certain real estate, and had afterwards given a security by deposit of the contract, with an accompanying memorandum, to the *Birmingham Banking Company*. The memorandum contained (among other things) a stipulation that he would, on request, assign to them his contract with *Foster*. Of this security, and of the fact that it was regarded by the bank as a charge upon the property, *Foster* had express notice; but it was held by the Court of Appeal in Chancery, and by this House, that, not having notice that the bank had made the necessary request to *Pooley*, on which the assignment of the contract by way of security was made contingent by the terms of the memorandum, he was under no obligation to make any inquiry on that subject, though he would have learnt (if he had done so) that the request had, in fact, been made; and that he was at liberty to convey the estate to *Pooley* without communicating with the bank, when the time for completion arrived. The principle of that decision seems to me to be applicable to the present case.

I am, therefore, of opinion that the judgment under appeal is right, and ought to be affirmed; and I move your Lordships that the appeal be dismissed with costs.

LORD BLACKBURN:—

My Lords, *James William Batten*, a builder, was a customer of the *Reading* branch of the *London and County Bank*, and in June,

(1) Law Rep. 5 H. L. 321.

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1872, deposited with that branch of the bank a deed of conveyance in fee from Sir *Peter Spokes* subject to a fee farm rent, being the title deed of some property called *Canterbury Villas*, on the terms usual between bankers and their customers, and at the same time signed a memorandum of the terms of that deposit. No question now arises as to this property, but it is necessary to mention it in order to make intelligible the transactions on which the questions in this case arise.

Batten got a conveyance, dated the 9th of December, 1871, from Sir *Peter Spokes* in fee, subject to a fee farm rent, which was *Batten's* title deed to some other land on which he subsequently built some villas; it is as to part of this land on which villas called *Woodbine* and *Twyford Villas* were erected that the questions arise.

Batten deposited this deed of the 9th of December, 1871, with the *London and County Bank*, and on the 17th of January, 1873, signed a memorandum of deposit. The manager of the *Reading* branch of the bank at a later date, the 17th of June, 1874, apparently very unnecessarily, took from *Batten* a further memorandum of deposit differing from that of the 17th of January, 1873, only in the date, and in adding a statement that besides the *Woodbine* and *Twyford Villas* two other villas called 1 and 2, *Granby Gardens*, had been built on the same property; and he, still more unnecessarily, destroyed the memorandum of deposit of the 17th of January, 1873, thinking it now useless. That memorandum when destroyed was unstamped, and an objection was below raised on the ground that being unstamped no evidence of its contents could be given, and that without evidence of its contents no case could be made for the *London and County Bank*. The Lords Justices permitted a copy duly stamped as an original to be read. As, notwithstanding that they received this copy in evidence, their judgment was that the action should be dismissed with costs, the Respondents did not, before this House, raise any point as to the reception of this evidence; and I may say, speaking for myself alone, that it was never explained to me what the objection under the revenue laws was, nor how it was obviated by the reception of this copy. An objection was raised by Mr. *Horton Smith* that the destruction of the memorandum of 1873, on grounds of common law, was fatal to the case of the *London and County Bank*. In the view which I take

of the law and facts it is not necessary to form any opinion as to this objection, and as I am unwilling, in the existing state of the authorities, to say anything unnecessarily on such a point, I shall express no opinion on it either way. I merely mention it to shew that it has not been overlooked.

The Defendant *Ratcliffe* had married *Batten's* sister. He had, it appears, lent to *Batten* £400, and *Batten*, as executor of his father's will, had to pay to Mrs. *Ratcliffe* a sum of money, which was afterwards ascertained to be £424 11*s*. A letter from *Ratcliffe* to *Batten*, dated the 11th of April, 1873, was put in evidence. The earlier part shews that *Ratcliffe* had seen *Batten* at *Reading*, and had understood from him verbally that ready money would be very useful to *Batten*, and that he, *Ratcliffe*, had promised to see what he could do. The material parts—and I think them very material—of this letter are as follow:—"I mentioned to *Lucy*" (his wife) "our conversation as to the property in the *Avenue*. She falls in with everything save the terms of *payment mentioned by you*. Her wish is that the amount I lent you (£400) and the third of residue due to her on the death of grandma, together with the sum accumulated, and, I presume, invested by you on that third portion before and since December, 1871, constitute part payment. I should not think of borrowing on mortgage more than £1000, or, at the very most, £1100, and would not place myself in the position to be obliged to repeat the mortgage at the expiration of five years. That would make my bargain a *dear one indeed*. I understand your position, and will do my very best, with the assistance of the £1000 from Mr. *Graham*, to pay you the whole due to you (after deducting the £400 and *Lucy's* third of residue, &c., due to her) by the close of June next. When I get the agreement from Mr. *Graham*, and approve of it, I will sign and let you or Mr. *Graham* have (as I may be directed) a deposit of £25. You shall also have shortly after to put yourself right with the bank, besides the £1000 from Mr. *G.*, the sum of £800 at least. Do not forget to mention to Mr. *Graham* the subject of the wall. Let me have also your letter respecting the villas only very partially finished, and a full statement of grandma's affairs and suggested mode of distribution, *before the agreement is sent*. We wish that first settled."

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The inference I draw from this letter is that at that time *Ratcliffe* was quite aware that *Batten* wanted ready money for the purpose of improving his credit with his bankers, and that he was willing to sell the property in question to *Ratcliffe*, £1000 or £1100 of the price to be raised by mortgage which *Graham* (a solicitor at *Newbury*, who was certainly acting for *Batten*) had said he could find; and now *Ratcliffe* offered to buy on terms already verbally discussed; that the residue of the purchase-money "(*after deducting the £400 and Lucy's third of residue, &c.*)" should be paid as soon as possible, for the purpose of improving his position with the bank. *Ratcliffe* swears that he neither then nor at any time knew that the title-deeds had been deposited with the bank, and I see no reason to doubt his assertion. I also draw the conclusion from this letter that *Graham* was as yet acting as solicitor for the vendor (*Batten*) only, and was to draw up the agreement in that capacity and send it to *Ratcliffe* for his approval, he, as yet, acting for himself in this matter. It is not important whether *Graham* was at any earlier date acting for both parties, for *Ratcliffe*, when he did receive and approve of the agreement, sent it, on the 28th of April, in a letter which undoubtedly made *Graham* his solicitor in completing the sale.

Before this it appears that *Batten* (and perhaps *Graham*) had seen the manager of the *Reading* branch, and he, on the 19th of April, sent the title deeds to the manager of the *Newbury* branch, with a request to hold them, "and let Mr. *Graham* arrange for the completion of their sale for £3200." *Graham*, who at least after the 28th of April, was solicitor for *Ratcliffe* in this transaction, was perfectly aware that the deeds had been deposited with the bank on the ordinary terms that they should be a security for all moneys which should at any time be due on the general balance. *Batten's* account was overdrawn, and *Graham*, if he did not know the precise balance, could easily have ascertained it, and had at least constructive notice what was the amount.

I think, therefore, it must be taken that *Ratcliffe*, who had as yet only paid in cash the deposit of £25, had notice that the bank held a security for what turns out to have been on the 2nd of May, which I think the important date, between £1700 and £1900, it is

not necessary to be more precise; he had bargained that the debt of £400 and the third of Mrs. *Ratcliffe's* money, together £824 11s., should be taken as part payment of the £3200, but he ought to have known (though very possibly he personally did not) that the debt to the bank was a prior charge on the land, and that whatever moneys he might pay in future to *Batten* would be so far thrown away unless *Batten* discharged it in some way or other.

Graham, on the 2nd of May, 1873, wrote to the manager of the *Reading* branch of the *London and County Bank* the following letter:—"*Newbury*, 2nd May, 1873. *Batten* and *Ratcliffe*. Dear Sir,—I received this morning the contracts signed by Mr. *Batten* and Mr. *Ratcliffe* respectively, and the 24th instant is fixed for the completion of the purchase. I have seen Mr. *Gurney* to-day, and have told him I will write you.—Yours truly, *Charles A. Graham*. *J. A. Strachan*, Esq." The agreement was dated the 28th of April, 1873, and the material parts were as follows:—"The vendor agrees to sell unto the purchaser, who hereby agrees to purchase, firstly, all those two messuages or tenements with stables, outhouses, gardens, and appurtenances called '*Canterbury Villas*,' situate at *Erleigh*, near *Reading*, *Berks*, subject to a fee farm rent of £12 per year to Sir *Peter Spokes*, his heirs or assigns; and, secondly, also all those two villas with appurtenances called '*Woodbine Villas*,' also situate at *Erleigh*. And the two villas with appurtenances also situate at *Erleigh*, aforesaid, and called '*Twyford Villas*,' subject as to the premises secondly before described to the apportioned fee farm rent of £20 payable to the said Sir *Peter Spokes*, his heirs and assigns. The purchase-money is fixed at the sum of £1500 in respect of the premises firstly described, the sum of £900 for *Woodbine Villas* and appurtenances, and the sum of £800 for *Twyford Villas*, £25 part of the purchase money to be paid down on the signing of this contract by way of deposit, and the remainder to be paid on the 24th day of May next, at the office of Messrs. *Graham*, Solicitors, *Newbury*, at which time and place the purchase is to be completed, and the said *Thomas Ratcliffe* shall, as from that day, be entitled to possession or the rents and profits of the said premises respectively, all outgoings up to that time being discharged by the

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vendor. On payment of the remainder of the purchase-money the vendor shall execute a proper conveyance of the premises unto the purchaser, such conveyance to be prepared by and at the expense of the purchaser. If from any cause whatever the purchase is not completed on the said 24th day of May next, the purchaser shall pay interest on the residue of the purchase-money from that day until completion of the purchase at the rate of £5 per cent. per annum. It is hereby agreed that the vendor shall, at his own cost, complete and finish in a workmanlike manner with good and proper materials, the villas called '*Twyford Villas*,' now in course of building, and also the wall on the south side of the same villas." This last passage explains the reference to a wall in *Ratcliffe's* letter of the 11th of April.

The letter of the 2nd of May, 1873, gave the bank distinct notice that the agreements were signed, which was the fact. It did not give the bank any notice that it was part of the bargain that £824 11*s.* was to be paid by way of set-off, and that *Batten's* vendor's lien was only good for the balance, or a little more than £2400, which, however, was more than enough to discharge all that was then due to the bank. Even if those acting for the bank had seen the agreements (which I think it is not proved that they ever did) the bank would not have found in them any stipulation as to how the price was to be paid. I think it most likely that *Batten* had led the bank to believe that the whole £3200 was to be paid in cash, and would pass through their hands; and it is not unlikely that *Graham* was not at all anxious to disabuse them of an expectation that must have tended to make them more liberal to *Batten;* but I see nothing tending to shew that *Ratcliffe* at any time, or *Graham*, whilst acting as *Ratcliffe's* solicitor, did anything to foster this belief. The bank asked no questions; and I think they had no right to assume that the price was not to be paid in any way which *Batten* or *Ratcliffe* might find most convenient. But *Ratcliffe* had notice (through his solicitor) that the deeds were pledged, as is universally the case with deposits with banks, not only for the existing balance, which on this 2nd of May, 1873, appears from the pass-book to have been between £1700 and £1900, but also for the general balance that might at any time become due, which might be very

much larger. And the question arises what was the effect of this last notice?

The further facts necessary to raise it are briefly these. *Graham* procured some one to take a mortgage of the *Canterbury Villas* for £1100, and I suppose had in some way or other informed *Strachan* that he had done so, and that this £1100 would be forthcoming, for the three following letters passed:—"*London and County Bank, Reading*, 26th May, 1873. Dear Sir,—Upon Mr. *Graham* paying the sum of eleven hundred pounds account *J. W. Batten* with this branch, be pleased to deliver to him the deeds of *Canterbury Villas*, retaining the deeds of *Granby Gardens* estate.—I am, dear sir, yours truly, *John A. Strachan*, manager. *Thos. Gurney*, Esq., *London and County Bank, Newbury*." "*Newbury*, 28th May, 1873. *Batten* and *Ratcliffe*. Dear Sir,—The £1100 is ready and will be paid to Mr. *Gurney* in a few days, the deeds having been sent to-day to *King's Lynn* for Mr. *Ratcliffe's* signature, preparatory to completing the purchase of *Canterbury Villas*. I understand that the *completion*, so far as *Woodbine* and *Twyford Villas* are concerned, will not take place until about the 24th of next month.—Yours truly, *Charles A. Graham*. *J. A. Strachan*, Esq." "*London and County Bank, Newbury*, 4th June, 1873. My dear Sir,—I beg to inform you that we credit your branch this day, by Mr. *Graham* on account of *J. W. Batten*, £1100, and have returned conveyance, *Spokes* to *Batten*, 9th December, 1871, receipt of which please acknowledge.—I am yours faithfully, *Thos. Gurney*. *J. A. Strachan*, Esq."

From that time the *Canterbury Villas* estate is out of the case. And by this payment of £1100 the balance of between £1700 and £1900, which was owing to the bank on the 2nd of May, 1873 (which I think is the day when the bank had notice that *Ratcliffe* had bought the property from *Batten*), was reduced to between £600 and £800.

I do not think that anything is proved that amounted to notice, either actual or constructive, to *Ratcliffe*, or to *Graham* when acting as *Ratcliffe's* solicitor, after that date of the 2nd of May, 1873; but in fact the bank continued their account with *Batten*, receiving payments from him and making advances to him, just as they might have done if there had been no notice of the sale

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to *Ratcliffe*. The balance on the account was never turned in *Batten's* favour. It is struck in the pass-book at the end of each three months. On the 1st of July, 1873, at £902 9*s.* 6*d.*, that is after credit had been given for more than £1600 (including the £1100) paid between the 2nd of May and the 1st of July. It is again struck on the 30th of September at £1424 17*s.* 3*d.*; that is, after giving credit for £327 19*s.* 3*d.* for moneys paid in during the three months between the 30th of June and the 1st of October. It is again struck on the 31st of December at £1824 17*s.* 7*d.*, that is, after giving credit for £957 2*s.* 1*d.* for moneys paid during those three months. It is not necessary to proceed further, for it is obvious that, if what is called the rule in *Clayton's Case* (1) is to be applied, the old balance due on the 1st of July was wholly paid off during the two quarters ending on the 31st of December, and the balance due on the 1st of January, 1874, consisted entirely of advances made after the 30th of June, which was some time after the bank had, on the 2nd of May, notice of the sale.

Ratcliffe paid to *Batten* at various times moneys, and gave him credit, which, in the whole, amounted to £3200, the last of these payments being on the 11th of March, 1876, when he took from *Batten* this receipt:—"11th March, 1876. Received from Rev. *Thomas Ratcliffe* the sum of four hundred and forty pounds and seven shillings and fourpence, being balance on completion of purchase of six villas (named in the conveyance deeds, *Canterbury*, *Woodbine*, and *Twyford Villas*), and also of all claims on account of ground rent for the aforesaid six villas up to March the 25th, 1876. *J. W. Batten.* £440 7*s.* 4*d.*"

He made these various payments without any inquiry as to whether *Batten* had paid off the charge the bank had on the property, which was not imprudent on his part, as he did not personally know that such charges existed, *Batten* and *Graham* not having informed him of that fact. But it is not and could not be disputed that, notice having been given to *Graham* while acting as his solicitor that the charge to this amount existed at the time when notice of his purchase was given on his behalf to the bank, no subsequent payments to *Batten* could avail against that charge. He must shew that the amount was paid to the bank. £1100 was

(1) 1 Mer. 585.

in every sense paid to the bank on the 4th of June, 1873. The balance between £600 and £800 is only accounted for if the rule in *Clayton's Case* (1) applies. The Vice-Chancellor thought it did not. He says,—"In my opinion no such principle is applicable to the case of deposit made with a banker. It has no application, because, as has been truly said, a banker's lien upon all matters deposited with him, or which come into his possession, extends over the whole of the account. When the relation of debtor and creditor subsists between the parties the lien is operative and active."

The Lords Justices were of a different opinion. Lord Justice *James* briefly says, "It is clear, from the bank accounts, that all that was due at that time was long since paid off." I agree with the Lords Justices. I think that the Vice-Chancellor is quite right in saying that, as between the banker and his customer, the lien is operative whenever the relation of debtor and creditor exists. If the payments made to the bank had been at any time, say during the three months from June to October, so great as for a time to turn the balance in favour of *Batten*, so that his account had been a solvent one, and the balance on the 1st of October in his favour, and afterwards advances had been made by the bank so great as to turn the balance the other way, it would be quite accurate to say that the lien for this new balance, as between the bank and *Batten*, was as effective as if the balance had never been turned; but could it then be contended that the old balance had not been discharged, or that, though *Ratcliffe* never had been told that the balance had for a time been turned, his property could have been held liable to make good part of the new balance, because it had been subject to a charge for that which was paid off? I take it such a contention would have been obviously untenable. And I do not see why the discharge by the application of the rule in *Clayton's Case* (1) should have less effect. The bank might, if they pleased, have taken the payments on such terms as to prevent the application of that rule, but, not having done so, it seems to me that the old balance was, before the end of the year, 1873, paid off.

But this leaves the question to be determined whether, as

(1) 1 Mer. 585.

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against the purchaser *Ratcliffe*, he having had notice (though I think only constructive notice) that the title deeds had been pledged to the bank on the usual terms, that they should be a security for all moneys which should at any time be due upon the general balance, the bank had a security on the property, after it had become *Ratcliffe's*, for advances made in the ordinary way, but after they had notice that the property had become *Ratcliffe's*. The Vice-Chancellor, by his decree, makes *Ratcliffe* a trustee for all these sums. I do not think that in his judgment he clearly indicates why he so thought, but I conjecture that he recollected what at one time was believed by many practitioners to have been the law settled by *Gordon* v. *Graham* (1), and thought it applied to this case, and that it was not brought to his notice that a majority of this House had in *Hopkinson* v. *Rolt* (2) determined, contrary to the opinion of Lord *Cranworth* who dissented, that *Gordon* v. *Graham* (1) had been misunderstood, and that a mortgage to secure future advances not exceeding a certain amount, though perfectly good as against the mortgagor, gave the mortgagee no equity to postpone advances made by a second mortgagee with notice of the first, to advances made by the first mortgagee after notice of the second mortgage. I do not inquire whether if the doctrine for which Lord *Cranworth* contended had been adopted by the House, and was the law as to advances by a second mortgagee, it would have applied to payments by a purchaser. I doubt it; but it being decided by this House that it was not law as to a second mortgagee, it follows, *à multo fortiori*, that it was not law as to a purchaser. In this I agree with the Lords Justices.

One more point was made at your Lordships' bar, which I think was not suggested before the Lords Justices, and, at all events, was not dealt with by them. It was said that *Batten*, not having been paid the whole price when he sold, still held the land as an unpaid vendor, with an unpaid vendor's lien against *Ratcliffe* for this unpaid amount; the sum could be afterwards ascertained, but it certainly was considerable. And *Batten* could pledge this unpaid vendor's lien to the bank, and if he did so, and notice was

(1) 2 Eq. Cas. Abr. 598, pl. 16; 7 Vin. Abr. 52, pl. 3.
(2) 9 H. L. C. 514.

given to the purchaser of such a pledge, the purchaser could no longer safely pay *Batten*, who could not give him a discharge without the concurrence of the pledgee; and in all this I agree. It was further argued that, the deeds having been deposited with the bank as a security for future advances, that did, *ipso facto*, pledge as a security for those future advances *Batten's* interest as an unpaid vendor which arose on the sale; and that *Ratcliffe*, having constructive notice of the terms of the deposit, was in the same position exactly as if he had actual notice that *Batten* had agreed to pledge his unpaid vendor's lien for future advances; and, in paying *Batten*, took the risk, not only of whether the previous advances had been paid off, but also of whether there had been any subsequent advances. This, in effect, raises the question whether any one purchasing land, with notice that the title deeds have been deposited with a bank, is bound to inquire whether the bank has, after receiving notice of this purchase, made fresh advances on the security of the unpaid vendor's lien; or whether the burden does not lie on the bank, advancing on the security of the unpaid vendor's lien, to give notice to the purchaser, that it has so done, or intends so to do. No case was cited in which any such point had been discussed; but I think both convenience and principle strongly point to the burden of giving notice lying on the bank, and not on the purchaser, whose inquiries might often be annoying and impertinent.

I am, therefore, of opinion that the appeal should be dismissed with costs.

LORD WATSON:—

My Lords, I concur—I have had the advantage of considering, in print, the judgments which have just been delivered by my noble and learned friends; and I have nothing to add.

Order affirmed, and appeal dismissed with costs.

Lords' Journals, 14th June, 1881.

Solicitors for Appellants: *Harries, Wilkinson, & Raikes.*
Solicitors for Respondent: *Ingle, Cooper, & Holmes.*

Dictum of LORD BLACKBURN at p. 829, *applied.* DARLING *v.* A.-G. [1950] 2 All E.R. 793.

[HOUSE OF LORDS.]

H. L. (E.) 1881 June 14.

CHARLES DALTON . . . . . APPELLANT;

AND

HENRY ANGUS & CO. . . . . RESPONDENTS.

THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS . . . . . APPELLANTS;

AND

HENRY ANGUS & CO. . . . . RESPONDENTS.

19 Ch D 285
25 Sol Jo 1
29 L T 3
20 Ch D 445-9
21 Ch D 563
10 Q B D 571
8 App Cas 444-6-7
12 Q B D 18
24 Ch D 734

Easement—Support of House by adjoining Soil—Prescription—Prescription Act, 2 & 3 *Will.* 4, *c.* 71, *s.* 2—*Principal and Agent or Contractor—Liability of Principal for Acts of Contractor.*

A right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment and so open that it must be known that some support is being enjoyed by the building.

Semble, per LORD SELBORNE, L.C.:—Such a right of support is an easement within the meaning of the *Prescription Act*, 2 & 3 Will. 4, c. 71, s. 2.

Two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the Plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment.

More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the Plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory:—

Held, that the Plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury.

Bower v. *Peate* (1 Q. B. D. 321) approved.

THESE were two appeals from a judgment of the Court of Appeal.

The action was brought by *Angus & Co.* against *Dalton* and the Commissioners of Her Majesty's Works and Public Buildings for damages in respect of injuries to the Plaintiffs' coach factory, and was tried before *Lush*, J., at the *Newcastle* Summer Assizes, 1876. The facts proved at the trial are stated in the judgments of *Lush*, J., and *Cockburn*, C.J. (1), and of *Thesiger* and *Brett*, L.JJ. (2). For the present report the facts stated in the headnote suffice. *Lush*, J., at the trial, directed the jury to find a verdict for the Plaintiffs for the damages claimed, subject to a reference as to the amount. The Queen's Bench Division (*Cockburn*, C.J., and *Mellor*, J., *diss. Lush*, J.), ordered judgment to be entered for the Defendants (1). The Court of Appeal (*Cotton* and *Thesiger*, L.JJ., *diss. Brett*, L.J.), reversed this judgment, and ordered that the Defendants should elect within fourteen days whether they would take a new trial, and, if they did not so elect, that judgment should be entered for the Plaintiffs for £1943, the damages assessed by the special referee, but without prejudice to the Defendants' proceedings in reference to the amount of damages (3). Upon the appeals the following counsel appeared.

Sir *F. Herschell*, S.G., and *Wheeler*, for the Appellant *Dalton*.

Sir *J. Holker*, Q.C., *Shield*, and *A. E. Gathorne Hardy*, for the Appellants the Commissioners.

Littler, Q.C., *Gainsford Bruce*, and *E. Ridley*, for the Plaintiffs, Respondents.

The appeals were first heard Nov. 13, 14, and 17, 1879. In pursuance of an order of the House they were again heard Nov. 18, 19, 22, and 23, 1880, in presence of the following Judges: *Pollock*, B., *Field*, *Lindley*, *Manisty*, *Lopes*, *Fry*, and *Bowen*, JJ., to whom the following questions were put:—

1. Has the owner of an ancient building a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land?

(1) 3 Q. B. D. 85. (2) 4 Q. B. D. 162.
(3) 4 Q. B. D. 162, 204.

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2. Is the period during which the Plaintiffs' house has stood, under the circumstances stated in the case, sufficient to give them the same right as if the house was ancient?

3. If the acts done by the Defendants would have caused no damage to the Plaintiffs' building as it stood before the alterations made in 1849, is it necessary to prove that the Defendants or their predecessors in title had knowledge or notice of those alterations, in order to make the damage done by their act in removing the lateral support, after the lapse of twenty-seven years, an actionable wrong?

4. If so, is it sufficient to prove knowledge or notice of the fact that such alterations were made, or is it necessary also to prove knowledge of their effect, in causing the buildings so altered to require a degree of lateral support from the adjoining land which was not before needful?

5. Was the course taken by the learned Judge at the trial, of directing a verdict for the Plaintiffs, correct, or ought he to have left any question to the jury?

The Judges desired time to consider, and on the 17th of March, 1881, delivered the following opinions:—

POLLOCK, B. My Lords, in answering the first question, it is necessary to bear in mind that it is not affected by any of the modern statutes whereby a prescriptive right can be gained by effluxion of time or by enjoyment; nor do I think that any useful arguments can be adduced by way of analogy from such statutes. It appears to me, however, that by a long series of decisions, and by the opinions expressed by learned Judges during a period extending over very many years, the common law affecting this question must be taken to have been settled in favour of the right. The right to lateral support of soil by adjoining soil is a natural right which exists wherever the lands of adjoining owners are in contact. The grounds upon which it is based are fully explained in the cases of *Humphries* v. *Brogden* (1) and *Rowbotham* v. *Wilson* (2). Where the soil is encumbered by buildings it is obvious that a different question arises, although the character of the rights when acquired is in each case the same. I will now proceed to notice those cases and *dicta* which in my judgment establish the conclusion at which I have arrived.

The earliest case which has any bearing upon the question is that of *Slingsby* v. *Barnard* (14th *James* I.) (3). The Court gave judgment in favour of the right of support, although the house in respect of which it was claimed was not an ancient house, but had been only recently built. This, although not referred to,

(1) 12 Q. B. 739. (2) 8 E. & B. 123.
(3) 1 Roll. Rep. 430.

must be considered to have been overruled by the case which followed it of *Wilde* v. *Minsterley* (15 *Charles* I.) (1), where it is said, "If *A.*, seised in fee of copyhold land next adjoining land of *B.*, erect a new house on his copyhold land, and part of the house is erected on the confines of his land next adjoining the land of *B.*, if *B.* afterwards digs his land near to the foundation of the house of *A.*, but not touching the land of *A.*, whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of *A.* against *B.*, because this was the fault of *A.* himself that he built his house so near to the land of *B.*; for he could not by his act hinder *B.* from making the most profitable use of *B.*'s own land." The cases are not of much value as establishing any principle, but they are not unimportant as shewing that the attention of the Courts was called to the question at this early date, and as thereby affecting the value of more recent decisions. *Palmer* v. *Fleshees* (15 *Charles* II.) (2), cited in *Comyns'* Digest (3), was an action for the obstruction of the Plaintiff's lights; but the Judges in their first resolution say "that if a man, being seised of land leases forty feet to *A.* to build a house thereon, and forty feet to *B.* for a like purpose, and one of them builds a house and then the other digs a cellar in his land which causes the wall of the first adjoining house to fall, no action will lie, for every one may deal with his own to his best advantage, but *semble*, that it would be otherwise if the wall or house were an ancient one." In *Stansell* v. *Jollard* (1803), Lord *Ellenborough* directed the jury that "where a man has built at the extremity of his land, and has enjoyed his building above twenty years, by analogy to the rule as to lights, &c., he has acquired a right to support, or, as it were, of leaning to his neighbour's soil, so that his neighbour cannot dig so near as to remove that support; but it is otherwise of a house newly built." This case is referred to in *Selwyn's* Nisi Prius, 9th Edition, upon the authority of *Lawrence*, J., also by Mr. *Smith* in his Leading Cases in the notes to *Ashby* v. *White* (4), and by Mr. *Gale* in his work on Easements as from a manuscript note (5). In *Hide* v. *Thornborough* (1846) (6), *Parke*, B., cited *Stansell* v. *Jollard* as law, and ruled that if there were twenty years enjoyment by the Plaintiff of the support of the house from the Defendant's land, and it was known that the Defendant's land supported the Plaintiff's house, that is sufficient to give him a right of support. Both these cases were cited as authorities by Lord *Campbell* in *Humphries* v. *Brogden* (7). In *Wyatt* v. *Harrison* (1832) (8), the plaintiff, who claimed a right of support to his house was held to fail, because it was not an ancient house; but Lord *Tenterden* in giving judgment says: "Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the Plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected, and if so, then, according

(1) 2 Roll. Abr. 564, tit. Trespass I. pl. 1.
(2) 1 Sid. 167.
(3) Action on the Case, Nuisance C.
(4) 1 Sm. L. C. 8th Ed. p. 306.
(5) 5th Ed. p. 371.
(6) 2 Car. & Kir. 254.
(7) 12 Q. B. 749.
(8) 3 B. & Ad. 875.

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to the authorities, the Plaintiff is not entitled to recover." *Partridge* v. *Scott* (1838) (1), was a case in which the Plaintiff claimed a right to support for two houses. As to one of these, it was not an ancient house, and the Court, therefore, decided against the right claimed. As to the other, it had been built by the Plaintiff on ground which had been so excavated as not to afford sufficient support to the house; and, therefore, as was said by the Court, the Plaintiff had caused the injury to himself without any fault on the part of the Defendants. The judgment, however, of the Court, which was delivered after consideration, is of importance, because, as is noticed by *Thesiger*, L.J., in his judgment below, it affirmed in substance two propositions: first, that the second house, being an ancient house, would, but for the excavation of the soil upon which it stood by the Plaintiff himself, have acquired an easement of support by virtue of an implied grant; secondly, that, apart from the *Prescription Act*, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years. In *Humphries* v. *Brogden* (1850) (2), the question of disputed right was between the occupier of land unbuilt on and the occupier of subjacent minerals; but in the considered judgment of the Court delivered by Lord *Campbell*, he reviews the authorities which relate to the right of support gained by houses, and referring to the cases of *Stansell* v. *Jollard* (3) and *Hide* v. *Thornborough* (4), distinctly lays it down that "where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house." In *Gayford* v. *Nicholls* (1854) (5), the Plaintiff's houses being modern, they had gained no right of support, but in giving judgment *Parke*, B., assumes that had they stood for twenty years it would have been otherwise, for he says, "This is not a case in which the Plaintiff has the right of the support of the Defendant's soil, by virtue of a twenty years occupation, or by reason of a presumed grant, or by a presumed reservation, where both houses were originally in the possession of the same owner, for, unless a right of support by some such means can be established, the owner of the soil has no right of action against his neighbour who causes the damage by the proper exercise of his own right." In *Rowbotham* v. *Wilson* (1857) (6), the Queen's Bench, Exchequer Chamber, and your Lordships' House were all of opinion that the question of general right was excluded by reason of both Plaintiff and Defendant claiming under predecessors whose rights were governed by the express terms of an award; but the questions before the Court involved the right to the support of houses by adjacent land, and in dealing with this some of the Judges seem to have considered the exist-

(1) 3 M. & W. 220.
(2) 12 Q. B. 749.
(3) 1 Selw. N. P. 11th Ed. p. 457.
(4) 2 Car. & Kir. 250.
(5) 9 Ex. 708.
(6) 6 E. & B. 593; 8 E. & B. 123; 8 H. L. C. 348.

ence of such a right after a house has stood for twenty years as settled law. I shall have occasion to refer to what they say more fully when considering the mode in which such a right is acquired. In *Rogers* v. *Taylor* (1858) (1), a right similar to that claimed by the Plaintiff in the present case was alleged in the declaration and denied by the plea. At the trial the late Lord Chief Justice *Cockburn* told the jury that he thought at the end of twenty years after the house had been built the Plaintiff would have acquired a right to support, unless in the meantime something had been done to deprive him of it, and that the jury must presume that the additional burden was put upon the Plaintiff's land by the assent of the adjoining owner, and a grant by such owner of a right of support. He left it to the jury to say whether the Plaintiff had enjoyed the support for the foundations of his house for twenty years. The jury found that the Plaintiff had enjoyed the right of support for his house on the foundations on which it stood without interruption for twenty years. This finding was treated as a verdict for the Plaintiff, and both the ruling and the verdict were upheld by the Court of Exchequer, upon the ground that the Plaintiff's house had stood for more than twenty years.

The most recent and the most important of the decided cases bearing upon the subject is undoubtedly that of *Bonomi* v. *Backhouse* (1858) (2), which came before the Court of Queen's Bench upon the argument of a special case, whereby it appeared that certain messuages and buildings in the declaration mentioned had been in existence for more than forty years without sustaining injury, that they were firmly supported by mines, earth, and soil underground contiguous and near to and under the land of the Plaintiffs, and that the Defendant who had become the occupier of coal mines under and immediately adjoining the Plaintiffs' buildings, had so worked the coal as to remove pillars under land distant about 280 yards from the Plaintiffs' property, whereby the roof of the Defendant's mine fell down and subsided so as to produce a thrust, the effect of which gradually extended laterally to the land upon which the Plaintiffs' houses were built and whereby they were ultimately let down and injured. The main question, which was decided by the Exchequer Chamber and by your Lordships' House (3) in favour of the Plaintiff, was that with reference to the *Statute of Limitations* the Plaintiffs' right of action accrued not when the coal was extracted by the Defendant from underneath his own land, but when the Plaintiffs' buildings were first injured. The Plaintiffs' right of support for his buildings was however clearly raised by the case as stated, and was considered and dealt with by the Judges who heard the arguments and also by some of the noble and learned Lords before whom the appeal came in this House. *Wightman*, J., in the Court of Queen's Bench, says: "Upon consideration of all the cases, it appears to me that the cause of action, in such a case as the present, is founded upon a breach of duty on the part of the Defendant by so using his own property as to injure that of his neighbour, and not upon any right of the Plaintiffs to an easement in, upon, or over the land of their neighbours. Where ancient buildings are standing upon the Plaintiffs' land, the Defendant must take care not to use his own land in such a manner as to injure them. The language used in

(1) 2 H. & N. 828. (2) E. B. & E. 622. 4 Jur. N.S. 1052
(3) 9 H. L. C. 503. 7 Jur. N.S. 889

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some of the cases is not very clear, but it appears to me that the cases of *Wyatt* v. *Harrison* (1); *Chadwick* v. *Trower* (2) in Exchequer Chamber, reversing the judgment of the Common Pleas in *Trower* v. *Chadwick* (3); *Partridge* v. *Scott* (4); *Roberts* v. *Read* (5); and the older cases of *Slingsby* v. *Barnard* (6); *Aldred's Case* (7), and the opinions expressed by the Judges in giving their judgment in the case of *Rowbotham* v. *Wilson* (8) in the Exchequer Chamber affirming the judgment of the Queen's Bench in *Rowbotham* v. *Wilson* (9) in the Exchequer Chamber at the sittings after last Trinity Term, are authorities to shew that the right claimed by the Plaintiffs is not a right founded upon the presumption of a grant or easement, but is the common right of an owner of land not to be injured in his property by the way in which the Defendant uses his, according to the two maxims of the law, '*Prohibetur ne quis faciat in suo quod nocere possit alieno*,' and '*Sic utere tuo ut alienum non lædas*.'" *Willes*, J., in delivering the judgment of the Court of Exchequer Chamber, said: "The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *primâ facie* a right of property analogous to the flow of a natural river or of air: *Rowbotham* v. *Wilson* (8); though there may be cases in which it would be sustained as matter of grant (see the *Caledonian Railway Company* v. *Sprot* (10)), whilst the latter must be founded upon prescription or grant, express or implied, but the character of the rights, when acquired, is in each case the same." In the House of Lords the Plaintiffs' right to recover, subject to the *Statute of Limitations*, seems to have been taken for granted, and that the interference with the house, as well as with the land, was present to the minds of the noble and learned Lords who were present, is obvious from what fell from them. Lord *Westbury*, L.C., in giving judgment, says, "I think it is abundantly clear, both upon principle and upon authority, that when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises." Lord *Cranworth* also said, "It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In truth, his right is a right to the ordinary enjoyment of his land." And Lord *Wensleydale* adds, "I think it is perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment."

If these cases and *dicta* are dealt with individually, and subjected to a close criticism, many of them are no doubt open to objections such as that in some the facts are not so fully stated as might now be desired; in others, the exact character of the legal right said to be affirmed and the mode of its acquirement are not fully or accurately dealt with, nor is the right always based upon the same grounds. But in considering these objections, it must be remembered that the

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(1) 3 B. & Ad. 871.
(2) 6 Bing. N. Cas. 1.
(3) 3 Bing. N. Cas. 334.
(4) 3 M. & W. 220.
(5) 16 East, 215.
(6) 1 Roll. Rep. 430.
(7) 9 Co. Rep. 57 b.
(8) 8 E. & B. 123.
(9) 6 E. & B. 593.
(10) 2 Macq. 449.

difficulties presented are essential to the gradual growth and development of all our unwritten law, of which this is only an instance, and further, that the enjoyment of every right which is established not by statute but by a long course of judicial decisions and *dicta*, would be open to attack if such a remark were allowed unduly to prevail. The substance and practical effect, therefore, of all that has gone before must be kept in view, especially in a case in which it is obvious that, having reference to the subject-matter with which the Courts were dealing and to the rights of the parties affected, the law laid down from time to time must have practically influenced the position of all who were interested in buying, selling, leasing, or building upon land within or near to towns and elsewhere wherever the land was available for building purposes, all of whom might well act and in many cases must have acted upon the supposition that they had acquired rights in accordance with the law so expounded.

Two points relating to this part of the cases were strongly urged on behalf of the Defendants. First, it was said that the right which is claimed in the present case for the support of a house had never been treated as a natural right, such as exists where soil unbuilt on is supported by the soil of an adjoining owner; and, secondly, that failing any natural right, there are only three modes known to the law whereby such a right can be created, namely, by express grant, by prescription evidenced by acquiescence, or by an implied grant, the latter of which has commonly been presumed in those cases in which the right claimed has been long enjoyed. These two questions may properly be dealt with together, because, in truth, the considerations which affect the nature of the right, and the mode by which it may be acquired in law are necessarily interwoven; and here it may be well to advert to the language used by *Lush*, J., in his ruling at the trial of this case, where he does not lay down that the right claimed by the Plaintiff is a natural right, as in the case where soil is supported by soil, but he uses this language: "I think it has become absolute law that where a building has stood for twenty years supported by adjacent soil, it has acquired a right to the support of the soil." On behalf of the Plaintiff it was argued before your Lordships that this must be taken as a rule of law not resting upon fiction or upon implied grant, but as a right of property, namely, an enjoyment of support which after twenty years becomes indefeasible in the same manner as the occupier of land may, by bare possession for a sufficient period of time, acquire a good title; and further, that the right which is acquired by the Plaintiff as attaching to his house is a right which restricts his neighbour, not from using or moving his own land, but from so using or moving it as to injure the Plaintiff's house. The proposition thus asserted appears to me to put the right of the Plaintiff upon a reasonable foundation, and if affirmed by your Lordships it would lay down an intelligible rule of law freed from difficulties which obviously present themselves whenever, with a view consistently to uphold what after all is merely technical, it has been endeavoured to rest the right in question upon a supposed actual grant which has been lost, or upon the production of evidence, great or small in degree, tending to shew a supposed *de facto* acquiescence in the building of the house by the neighbour whose land supports it, either of which involves a supposition so improbable as to make it repugnant to good sense, and therefore one upon which it is most undesirable that Judges and juries should act.

There is, however, authority in support of the view which I have taken; not

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only is it said by *Willes*, J., in *Bonomi* v. *Backhouse* (1) that the character of the right of the owner of a house to support when acquired is the same as the right of the owner of soil unbuilt upon, but in *Humphries* v. *Brogden* (2) Lord *Campbell*, in delivering the judgment of the Court, says: "Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man, and acquiesced in by another who has the power to interrupt them, and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." *Parke*, B., also, in the passage which I have already cited from his judgment in *Gayford* v. *Nicholls* (3), treats the right of support gained by a house which has been built for twenty years as depending upon something distinct from such a right gained by a presumed grant or reservation. So also in *Rowbotham* v. *Wilson*, *Bramwell*, B., during the argument (4), asserts that after a house has stood for twenty years it acquires a right to support from the adjoining land; upon which Serjeant *Hayes*, *arguendo*, says, "That is an incident which the law then annexes, it is sometimes said to be founded on a presumed grant, but that after all is a mere fiction;" and *Cresswell*, J., adds: "I always thought that would turn out to be a matter of positive law, like the light acquired by constructing a window." In the same case *Watson*, B., commencing by dealing with the right to support of soil by soil, says: "If, by digging, the adjoining land is let down the right to compensation is on the ground that the adjoining owner could not use his own land to the prejudice of his neighbour, not on the ground of the disturbance of an easement (2 Roll. Abr. 564, Trespass (I.) pl. 1). The course of precedents shews this, for it is not necessary to allege, in such case, that the Plaintiff had the right to support: *Earl of Lonsdale* v. *Littledale* (5), and the declaration and judgment in *Humphries* v. *Brogden* (6); with this distinction, that the right to support to a building upon the land is acquired by twenty years existence, whereas the land is entitled to support in its original state." The observations of *Bramwell*, B., in his judgment (7), if they are to be considered as referring to the Plaintiff's houses as well as to his land are to the like effect. In confirmation of this view I would refer also to those portions of the judgments in *Bonomi* v. *Backhouse* which I have already cited. If I am right in supposing that the proposition which I have asserted in answer to your Lordships' question is established by legal decisions, it would not be necessary at this period of time to scan very closely the reasons upon which those decisions were based; but when the subject matter is looked at from a point of view which considers the rights of the community as well as those of individual owners, the grounds in favour of allowing a right of support to be acquired by building

(1) E. B. & E. 655. 5 Jur. N.S. 1345
(2) 12 Q. B. 749.
(3) 9 Ex. 708.
(4) 8 E. & B. 140. 4 Jur. N.S.
(5) 2 H. Bl. 267.
(6) 12 Q. B. 739.
(7) 8 E. & B. 146. 4 Jur. N.S. 1297.

appear to me to preponderate over those that can be urged to the contrary. It was said by *Willes*, J., in *Bonomi* v. *Backhouse* (1): "The law favours the exercise of dominion by every one upon his own land and his using it for the most beneficial purpose to himself." In *Rogers* v. *Taylor* (2), to which I have already referred, *Martin*, B., in the course of the argument asks, "Has not a man reasonably using his land a right to support for it?" In my judgment such a right may and ought to attach to the ownership of all land, it being no more than the right of the owner to adapt his land to one of the common and usual requirements of mankind.

In the arguments of counsel and also in the judgments in the Courts below, the cases which deal with the right gained by prescription for ancient lights were referred to and fully discussed. I forbear to follow these; partly because all that can be said with respect to them appears to have been thoroughly exhausted, and also for this further reason, most of the cases which relate to the doctrine of lights were decided upon the Prescription Acts; and even where this is not so, the right which is gained by the owner of a house in respect to lights is of so peculiar a character that it does not appear to me to afford much useful analogy when dealing with the right to support. Two observations, however, with regard to the case of lights have some bearing upon the present question. It is said that no right can ever be gained except where the owner of the servient tenement could prevent the act done by the owner of the dominant tenement whereby the right is alleged to have been acquired, or could have brought an action in respect of it, and that it is the forbearing to interfere with the exercise of the right, or to bring an action in respect of it, which leads to the inference of acquiescence, whence an implied grant may be presumed. In cases of affirmative easements, such as the user of a footpath, this is undoubtedly true. If, however, it is attempted to apply the same rule to the case of lights where the right acquired is of a negative character considerable difficulty arises, because, although in many cases the owner of a house or land may prevent his neighbour acquiring a right to lights by blocking them without putting himself to any great expense or inconvenience, there are other cases, such as where the windows are at a great height from the ground, in which the expense or inconvenience of blocking windows would practically be as great or almost as great as would attend upon the excavating of land in such a manner as to prevent a neighbour who builds acquiring a right of support; and looked at from this point of view such analogy as does exist between the two cases appears to me rather to favour the view of the Plaintiff when he asserts that such a right as he claims may be obtained without any actual acquiescence by the Defendant; and it is quite clear that in case of lights the right is not the less gained by the owner of the dominant tenement, because the owner of the servient tenement has forborne any right of action against him, for although the owner of the servient tenement may in some cases prevent the growth of the right by blocking the windows, in no case could he bring an action against his neighbour because they had been opened. The second observation which points to the same conclusion is that the mode of acquiring a right to light cannot be properly compared to the mode by which a right of way is acquired. The latter can from its very nature only be acquired by user accom-

(1) E. B. & E. 656. (2) 2 H. & N. 832.

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panied with the consent of the owner of the land over which the right of way is claimed. The former is acquired by mere occupancy. This was pointed out by *Littledale*, J., in his judgment in *Moore* v. *Rawson* (1), and the distinction which he draws has been frequently acquiesced in and was mentioned with approval by *Willes*, J., in *Bonomi* v. *Backhouse* (2), and by *Wightman*, J., in *Webb* v. *Bird* (3).

If but little assistance can be gained by referring to the rights which the law has affirmed in favour of ancient lights, still less in my opinion is afforded by reference to the cases cited by counsel for the Defendants of *Webb* v. *Bird* (4) where the owner of a windmill which had been erected more than twenty years claimed the right of the passage of air to it uninterrupted by his neighbours; and *Bryant* v *Lefever* (5) in which the owner of a chimney complained of the owner of adjoining land for rebuilding a wall of greater height than it had been for twenty years, and thereby causing him annoyance by smoke. There is really no parallel between those cases and that before your Lordships, and the view I take of the present case is in no way affected by them. I notice them only to shew that they have not been overlooked.

As to the second question the period during which the Plaintiffs' house has stood will be found in par. 4 of the Respondents' case, where the effect of the evidence at the trial is given as follows: "It was proved that both the factory of the Plaintiffs, and the house pulled down by the Defendants, were ancient buildings, both of which had been formerly, and for a period long exceeding twenty years before 1849, used as dwelling-houses; that there was no party wall between them, but that they were divided by a wall which belonged to the house pulled down by the Defendants; nor was there any cellar under the latter; that since the year 1849 there had been no alteration in the Plaintiffs' premises, but that in that year their predecessors openly, notoriously, and without concealment converted the same into a coach factory, in which their business had been since that time so openly carried on." Under these circumstances, I am of opinion that the period during which the Plaintiffs' house has stood at the date of the acts done by the Defendants which are complained of by the Plaintiffs was sufficient to give them the same right as if the house was ancient. The law upon this point cannot be more clearly summarised than it was by *Lush*, J., in his judgment in the Court below, where, starting with a period down to *James* I., he says: (6) "Theoretically, an *ancient* house at this period was a house which had existed from the time of *Richard* I. Practically, it was a house which had been erected before the time of living memory, and the origin of which could not be proved. But it afterwards came to be settled law that an uninterrupted possession of light, water, or any other easement for twenty years afforded a ground for presuming a right by grant, covenant, or otherwise, according to the nature of the easement; and, if there was nothing to rebut the presumption, a jury might and should be directed to act upon it." This view is amply borne out by the note of Serjeant *Williams* in 2 Wms. Saund. 174, and the cases there cited, and

(1) 3 B. & C. 339.
(2) E. B. & E. 654.
(3) 13 C. B. (N.S.) 843.
(4) 10 C. B. (N.S.) 268; in error, 13 C. B. (N.S.) 841.
(5) 4 C. P. D. 172.
(6) 3 Q. B. D. 89, 90.

by the other authorities which are alluded to by *Lush*, J., in his judgment below. The presumption arising from twenty years enjoyment cannot, no doubt, be treated as conclusive, that is, as a *præsumptio juris et de jure*, which is not to be rebutted by evidence; it is conclusive only when the evidence of enjoyment is uncontradicted and unexplained. Thus it might be shewn that no grant could have been legally made by the owner of the servient tenement, as was the case in *Barker* v. *Richardson* (1), where lights had been enjoyed for more than twenty years over land which during part of that time had been glebe land. It was held there that a grant could not be presumed, inasmuch as the rector being only tenant for life was incompetent to grant such an easement. In the present case, however, no evidence appears to have been offered on the part of the Defendants to contradict or explain the user by the Plaintiffs which ought to have been submitted to the jury. For the reasons which I have already given, evidence which merely shewed that there had been no actual acquiescence by the Defendants would have been irrelevant.

In answer to the third question, I say that it is not necessary to prove that the Defendants or their predecessors in title had knowledge or notice of the alterations, in order to make the injury to the Plaintiffs' building by removing the lateral support after the lapse of twenty-seven years an actionable wrong. The alterations made by the Plaintiffs in 1849 amounted merely to the conversion of that which had been a dwelling-house into a coach factory, and no evidence was adduced to shew that these alterations had been done otherwise than openly, and in the usual manner of building applicable to such an object. It appears to me, therefore, that what was done by the Plaintiffs was that which they might lawfully do for the purpose of improving their premises and using them in the manner most advantageous to their business: and that, therefore, the relations between themselves and the Defendants in respect to such alterations and any additional weight or further onus upon the Defendants occasioned by them, are to be looked at in precisely the same light as if the building of the Plaintiffs had been originally constructed as a coach factory, and not as a dwelling-house; or as if in 1849 the Plaintiffs had pulled down their dwelling-house and built a coach factory on its site; or as if there having been no dwelling-house or building until 1849 the Plaintiffs had built for the first time a coach factory in the form in which it stood after the alterations that were made by them at that date. Under these circumstances it becomes unnecessary for me to deal with the arguments which were addressed to your Lordships' House at the Bar, arising out of the distinction which was taken between the original dwelling-house and the alterations that were made in 1849.

The mode in which I have answered the third question renders it unnecessary for me to answer the fourth question.

In conclusion, I answer the fifth question submitted to us by your Lordships by saying that the course taken by the learned Judge at the trial of directing a verdict for the Plaintiffs was correct, and that he ought not to have left any question to the jury. Had any question been raised by the Defendants at the trial with regard to the facts which were given in evidence, it would have been the duty of the learned Judge to take the opinion of the jury upon these facts,

(1) 4 B. & Ald. 579.

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but no such question was raised, and the facts were substantially admitted by both sides. Under these circumstances the only matter which remained for decision was, what was the proper legal result of those facts; and, assuming the view which I have taken to be right, the course adopted by the learned Judge of directing a verdict for the Plaintiffs was correct and in accordance with what has usually been done by Judges on similar occasions, with this exception, that instead of resorting to fiction and directing the jury that they ought to find a lost grant of support as a matter of fact, *Lush*, J., told them that the Plaintiffs were entitled to the verdict as a matter of law, and directed them to find accordingly.

FIELD, J.:—My Lords, I answer your Lordships' first question in the affirmative. I think that the owner of a building, who has uninterruptedly enjoyed the support of it by the adjacent land of his neighbour for the period required by law to make it an "ancient" building, has acquired a right to the degree of support thus afforded, and that its absolute withdrawal so as to cause injury to the building is an actionable wrong. I also think that this right rests upon uninterrupted enjoyment and does not require for its foundation any actual or implied grant or covenant by the adjoining owner. The right seems to me to arise thus: So soon as the surface of the land becomes divided, either vertically or horizontally, into separate and exclusive tenements, one of the first and clearest principles applicable to each separate holding is, that the owner has the right given to him by implication of law to use his property as best he likes, provided that he does not by such user injure the rights of his neighbour. If neither he nor his neighbour have built on or dealt with their respective portions, and the latter are in their natural state and condition, it is clear that each owner has as against the other a right to have his soil supported by the soil of his neighbour, whether adjacent or below, and any act done by one which destroys that support so that the land of the other falls is an actionable wrong, and that is so, although the act complained of is not done by him maliciously, but simply in the exercise of his own right to use his own property. Although, therefore, either of them may dig in his own soil as deep and as near to his own boundary or to the surface as he chooses, this right is subject to one limitation from the very first, viz., that he cannot dig so deep and so near as to cause his neighbour's land to sink, unless he substitute some other sufficient support: *Wilde* v. *Minsterley* (1); *Humphries* v. *Brogden* (2); *Rowbotham* v. *Wilson* (3). This limitation, however, upon his right is accompanied by a like limitation of his neighbour's right, so that the advantage and burden are mutual in quality, although they may vary in degree.

It is clear that these rights and burdens come into existence by implication of law at the very moment of severance. They are unquestionably known as "natural rights," and require no age to ripen them. The same origin is, I think, to be ascribed to rights and burdens of a similar character existing in respect of flowing water. It happens that land allotted in severalty is bounded by a natural river, and when that is the case the implied terms are imposed upon the owner of that land and upon all other owners of other lands bounded by the same

(1) 2 Roll. Abr. 564, Trespass, I. pl. 1.

(2) 12 Q. B. 739.

(3) 8 H. L. C. 348.

stream, that each one is entitled to have the flow continue in its natural course and channel for the natural use and benefit of all, and is subject to the like burden of not interfering with that flow to the prejudice of any. Besides and in addition to these rights the owner of the land in its natural state has also of course the absolutely necessary enjoyment of the free passage of light and air in its natural state over and from his neighbour's land to and over his own. But unlike the right of support of soil by soil and of the flow of water in a defined course, the owner in the case of light and air has originally no right of enjoyment which can prevail against his neighbour's right to make any use of his land he may like, although such use will interfere with the natural transmission of the light and air. But if the owner of the land wishes to erect a building with openings for the admission of light and air he may proceed to do so by building (as he has a right to do) his wall with the windows in it close to the very verge of his own land, so that it owes of necessity its support in part to the neighbour's adjacent soil, and the windows receive their light and air directly from it. He has thus taken into his own enjoyment and, as it were, into his own occupation the soil of his neighbour, and also the light and air transmitted to him by his neighbour by a confinement and enjoyment of it in a particular definite channel. But although his doing this is a perfectly lawful act requiring no grant, license, or assent from the adjoining owner, it does not at first confer any right as against his neighbour, either of support of the wall or of transmission of light or air, or impose any burden in those respects on his neighbour. The latter may at first and until the lapse of a definite period of enjoyment use his own soil by digging or otherwise, or build a wall up to the very edge of his own ground, notwithstanding that by so doing respectively he causes his neighbour's building to fall or obstruct the passage of the light and air through the window. Neither building nor window has yet become "ancient." For these propositions I refer to *Palmer* v. *Fleshees* (1); *Wyatt* v. *Harrison* (2); *Partridge* v. *Scott* (3). But if he do not by some act of interruption prevent it, the open continuance of this enjoyment by the adjoining owner for the requisite period of time, makes the building or windows to be "ancient," and converts the *de facto* enjoyment into a right, an injury to which thenceforth by any use of the neighbour's land is an actionable wrong. Interruption of the enjoyment is the only mode by which the acquisition of this right can be prevented; nothing short of it is of any avail, and no actual assent is required to convert the lawful enjoyment into a right. This is laid down by *Bayley*, J., in *Cross* v. *Lewis* (4), and by *Littledale*, J., in *Moore* v. *Rawson* (5).

These propositions are the result I think of the authorities cited and analyzed by my Brother *Pollock* in the opinion which he has just expressed to your Lordships. I do not propose to go through those authorities in detail, but merely to add such observations as seem to me to support the conclusion at which he and I have arrived. As was remarked by the late Lord Chief Justice in his judgment below, the cases to be found in the books relating directly to the right of lateral support of "building" by adjacent "soil" are comparatively few, but there are

(1) 1 Lev. 122; 1 Sid. 167; 1 Keb. 625.
(2) 3 B. & Ad. 871.
(3) 3 M. & W. 220.
(4) 2 B. & C. 686.
(5) 3 B. & C. 339.

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found in the books a vast number of authorities in reference to other rights of a more or less analogous character which seem to me to bear upon the question. Those authorities may be divided generally into four classes according as they relate to: (1st.) Vertical or lateral support of land or buildings; (2nd.) Light and air; (3rd.) Water; and (4th.) Way or common, or rights of that nature. In the cases relating to the rights of the first class, I find it clearly laid down that by the uninterrupted enjoyment in fact of lateral support of an "ancient" building the right to the support is acquired. In *Wilde* v. *Minsterley* (1), and in *Palmer* v. *Fleshees* (2), the words used to cover the existence or non-existence of the right are "ancient" or "new" messuage, and I find the proposition stated, substantially in the terms which I have used, by Lord *Ellenborough* in *Stansell* v. *Jollard* (3), by *Parke*, B., in *Hide* v. *Thornborough* (4), and again in *Gayford* v. *Nicholls* (5); by *Cresswell*, J., and *Bramwell*, B., in *Rowbotham* v. *Wilson* (6), and lastly and most elaborately and unequivocally in the judgment of *Wightman*, J., in *Bonomi* v. *Backhouse* (7), in which he distinctly treats the actionable wrong in such a case as founded upon the breach of duty in one man's using his property so as to injure that of his neighbour; not as founded on any presumption of grant or easement, but the common right of an owner of land not to be injured in his property by the wrong of his neighbour. In this view *Campbell*, L.C.J., and *Coleridge* and *Erle*, JJ., all concur, and I conceive it to have been the view entertained by some of the noble and learned members of your Lordships' House who advised the House upon the judgment of the appeal (8). I am well aware that it has been doubted whether this assertion of the law in the last case is to be considered as an authority applicable to the one now before your Lordships, but I am unable to share in that doubt for the reasons stated by my Brother *Manisty*.

Besides these cases which involved the right of "lateral" support of buildings, there is also one relating to "vertical" support in a case where the subjacent strata had been severed from the surface. The right of support of the surface soil in such a case is analogous to the right of "lateral" support, indeed so much so that in the case of *Humphries* v. *Brogden* (9), in which the right of the owner of the surface to have it supported by the subjacent severed minerals was first directly asserted, that right was deduced from the previous authorities cited above as to the right of "lateral" support, and in the case of support of surface by the minerals below there is now no question but that the right is a natural one.

In *Rogers* v. *Taylor* (10), the case to which I refer, the Plaintiff's house had been built in 1824 upon land the quarries underlying which had been expressly excepted from the conveyance to him, and had become therefore a separate tenement, and the stone under the house had been got by the owner of the excepted quarries in 1840, leaving supports of the house at that time sufficient. In 1853 the Defendant, the owner of the quarries and also of adjacent land, in quarrying

(1) 2 Roll. Abr. 564, Trespass, I. pl. 1.
(2) 1 Lev. 122; 1 Sid. 167; 1 Keb. 625.
(3) 1 Selw. N. P. 11th Ed. 457.
(4) 2 C. & K. 250.
(5) 9 Ex. 707.
(6) 8 E. & B. 140, 146, 157.
(7) E. B. & E. 636.
(8) 9 H. L. C. 511.
(9) 12 Q. B. 739.
(10) 2 H. & N. 828.

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cut away the supports under the Plaintiff's house and it fell. At the trial before the late Lord Chief Justice *Cockburn* it was contended on behalf of the Defendant that in order to make out a title to have the house supported by the subjacent soil, the Plaintiff was bound to shew a continuous enjoyment for the required period "as of right," and that there had in fact been none such, but only a contentious enjoyment. But the direction of the Lord Chief Justice was that at the end of twenty years, after having built the house the Plaintiff acquired the right of support unless something had been "done" to deprive him of it, and the question he left to the jury was whether the Plaintiff had enjoyed the support for the foundation of his house for twenty years. The jury found that he had done so, adding the words "without interruption," and the ruling and verdict were upheld. I cite this case for the purpose of the precise language of the Lord Chief Justice in his ruling and direction. At the same time there is no doubt but that the Court of Exchequer, in supporting the direction and verdict, were inclined to place the right of vertical support of a house in the category of easements, requiring prescription or presumed grant for its foundation, and they adopted the same view as to "lateral" support in *Partridge* v. *Scott* (1), whilst in *Solomon* v. *Vintners' Company* (2), a case of support of building by building, they went further and expressed doubts as to the authority of *Stansell* v. *Jollard* (3), *Hide* v. *Thornborough* (4), and the observations of Lord *Campbell* in reference to this subject in *Humphries* v. *Brogden* (5).

In order to appreciate the correctness or otherwise of this view it is, I think, desirable to refer a little more in detail to the case of *Partridge* v. *Scott* (1), for the reasoning of the Judges in that case shews that they were ready to affirm the existence of the right after the lapse of the requisite period of enjoyment, although they entertained a different view from that expressed in the decisions I have referred to as to its origin and mode of acquisition. The material facts in *Partridge* v. *Scott* (1) were, that there were two houses in respect of injury to which the action had been brought. One had existed more than thirty years, and was admittedly "ancient;" the other was admittedly "new;" and both were at the time of action brought found to be on excavated ground, so that at some time or other the surface had been deprived in part of what otherwise would have been its natural support. There was no evidence to shew when this had happened, but it is obvious that in this state of things the owner of the houses had ever since that time been *de facto* enjoying a greater degree of support by, and was throwing upon, the neighbouring soil, a greater burden than if his underlying soil had been in its natural position. The fact of the excavation was also unknown to both parties, and, as beyond all question the acquisition of the right depends upon the non-interruption of the enjoyment by the neighbour only where he has the knowledge or means of knowledge that it is being had, and all he knew in that case was the inference which he was bound to draw from the known fact of the house being built and of necessity deriving support from his soil, the Court of Exchequer held that no right of support had been gained of either house, of one because it was "new," and the other because the underlying strata

(1) 3 M. & W. 220.
(2) 4 H. & N. 598.
(3) 1 Selw. N. P. 11th Ed. 457.
(4) 2 C. & K. 250.
(5) 12 Q. B. 739.

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might have been removed within twenty years. The inference to be drawn from this case seems to me to be that but for that fact the right would have been acquired. It was pointed out by *Littledale*, J., in *Moore* v. *Rawson* (1) (a case of light), and by *Fry*, J., in *Hall* v. *Lichfield Brewery Company* (2), that such a right is not properly the subject of "grant," but that the implication of law to be made in support of it is a covenant not to interfere with the enjoyment, which seems to me to be merely an alternative mode of stating the right to depend (as put by *Wightman*, J.,) upon the maxim of "*Sic utere tuo ut alienum non lædas.*" It is, I know, thought by some, for whose opinions I have the highest respect, that, thinking, as they do, that the right rests upon a presumed grant, it can only exist where all the circumstances are such as would have existed if there had been in fact such a grant made, and that it is unjust and inequitable to hold that such a right can be gained in cases like this where the servient owner has, as is admittedly the case, no power of preventing the enjoyment which is to found it. It is, however, clear that where the surface and subjacent strata have been divided horizontally into separate tenements, a house built by the owner of the surface, and which has, *de facto*, enjoyed the support of the subjacent minerals for more than twenty years has acquired the right of support of that mineral, unless, as in *Rowbotham* v. *Wilson* (3), there is evidence to the contrary; and in *Partridge* v. *Scott* (4) the right would have been extended by the Court of Exchequer to lateral support if the enjoyment there known had existed for twenty years. But what power has the servient owner in those cases to "prohibit" otherwise than by actual interruption of the *de facto* enjoyment; he cannot prevent the building; he cannot bring any action in respect of it? he can do nothing but interrupt the enjoyment. In the analogous case of light there is the same limitation of the power of prohibition, and yet the right admittedly exists; and in the cases as to water, to which I shall hereafter advert, in which the absence of the power of prohibiting was referred to, some of the Judges who decided them, including, I think, one of your Lordships, declared that the decision in those cases was without prejudice to the determination of the question now raised for decision by your Lordships' House. Moreover, the foundation of a right upon mere long uninterrupted possession, as a matter of public convenience, is of very general application. Statutes of Limitation have no other origin, and it is upon this principle that *Story*, J., in his well-known judgment in *Tyler* v. *Wilkinson* (5), puts rights of this kind, for he says, "twenty years uninterrupted enjoyment is held upon principles of public convenience a conclusive presumption of a 'grant,' or 'right'" (expressly asserting the alternative). "The presumption is applied as a presumption *juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law."

But whatever may be the correct view as to the origin of the right, all the authorities seem to agree that after twenty years' enjoyment the right is acquired; in the one case the view being that it arises from a presumption of origin by grant to be made in each particular case from long uninterrupted possession, in

(1) 3 B. & C. 339.
(2) 49 L. J. (Ch.) 656.
(3) 8 H. L. C. 348.
(4) 3 M. & W. 220.
(5) 4 Mason, U. S. R. 402, cited in *Gale* on Easements, 219.

the other case that it has become an universal settled rule of law that the open enjoyment uncontradicted and unexplained is sufficient by itself, and that there is in modern times, at least, no necessity for presuming in each particular case a thing which everybody knows is a mere fiction. That in any view the enjoyment must not be "*clam*" is clear; for to hold that a man is bound by a right of the growing acquisition of which he had neither knowledge, nor the means of knowledge, would be unjust and inequitable. Upon this absence of the means of knowledge of the enjoyment, the cases of *Partridge* v. *Scott* (1) and *Solomon* v. *Vintners' Company* (2) may well stand, and indeed the judgment of *Bramwell*, B., in the latter case is expressly based upon it.

My Lords, I now proceed to consider whether the authorities upon which I rely are fortified, or otherwise, by the authorities which relate to the rights as to light and air, between which and the right now under discussion a close analogy, in my judgment, exists. They both have their *de facto* origin in the same lawful use of land for habitation, and the necessity of light and air for its enjoyment. That such analogy has been *thought* to exist is clear. In the earlier books the right of light is asserted in conjunction with, and as mutually illustrating, or illustrated by, the right of support. In *Palmer* v. *Fleshees* (3) the assertion of the then apparently well understood right of support of an "ancient" building was made, as tending to shew the existence of the right to the enjoyment of an "ancient" window. In *Stansell* v. *Jollard* (4) Lord *Ellenborough e converso* fortified his ruling, that a *de facto* enjoyment for above twenty years of support gave the right to it, by referring to light as analogous; and so also the Court of Queen's Bench, in the case of *Humphries* v. *Brogden* (5), and *Cresswell*, J., in his observations during the argument in *Rowbotham* v. *Wilson* (6) resort to the same analogy. If, then, that analogy exist, it will, I think, be found on reference to the authorities on the subject of light, that they affirm the conclusion arrived at from the consideration of those relating to support. In *Moore* v. *Rawson* (7) the question to be decided was whether the dominant owner had lost a right to "ancient" windows which at a former time he unquestionably had possessed, and it was held that he had lost it by a mere abandonment of the enjoyment; and that result was arrived at by the application to the question of extinguishment of the principle upon which the right had originally been acquired. In his judgment in that case, *Bayley*, J., says (8), "The right to light, air, or water, is acquired by enjoyment," adding later on, "I think that according to the doctrine of modern times we must consider the enjoyment as giving the right." *Littledale*, J., says, "According to the present rule of law a man may acquire a right of way or a right of common. . . . But there is a material difference between the mode of acquiring such rights and a right to light and air. The latter is acquired by mere occupancy, the former can only be acquired by user accompanied with the consent of the owner of the land. . . . But it is otherwise as to light and air. Every man on his own land has a right to all the light and air which will come

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(1) 3 M. & W. 220.
(2) 4 H. & N. 585.
(3) 1 Lev. 122; Sid. 167; Keb. 625.
(4) 1 Selw. N. P. 11th Ed. 457.
(5) 12 Q. B. 739.
(6) 8 H. L. C. 348.
(7) 3 B. & C. 339.
(8) 3 B. & C. at p. 336.

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to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light he does not require any consent from the owner of the adjoining land; he therefore begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building the owner of the adjoining land may afterwards, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected the law implies from the non-obstruction of the light for that length of time that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction." That this right arises from the mere uninterrupted enjoyment is, I think, further shewn by two cases decided by *Wilmot*, C.J., in 1761 and 1768. In the first case, *Lewis* v. *Price* (1), the Chief Justice said (I do not know whether it was at Nisi Prius or not): "Where a house has been built forty years and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally some agreement between the parties." And in the second case, *Dougal* v. *Wilson* (2), where the Defendant proposed to shew the non-existence of the windows at a period within the time of legal memory, the Chief Justice said: "If a man has been in possession of a house with lights for sixty years no man can stop them up." In another case, the *Wells Harbour* (3), *Buller*, J., cited the language of the presiding Judge thus, "I think twenty years uninterrupted possession of windows is a sufficient right for the Plaintiff's enjoyment of them." It has indeed been supposed that the decisions of *Wilmot*, C.J., were disapproved of in the subsequent case of *Darwin* v. *Upton* (4), but I cannot share in that view. That case was tried at Nisi Prius before *Gould*, J. It appeared that the lights had been in existence for twenty-five years, and the Defendants offered to prove that they had had no earlier existence. *Gould*, J., thought that the possession for twenty-five years, if unanswered, was sufficient, but if the Defendant could offer anything to explain the possession and shew that it was in any way limited or modified or was bad in its commencement he might do so. No evidence of that kind having been offered a verdict was given for the Plaintiff, with leave reserved to move. On the motion a rule was granted upon the counsel's allegation that *Gould*, J., had told the jury that the possession was an "absolute" bar, instead of leaving the question to them as a presumptive bar, and upon that supposition the rule was in the first instance made absolute, but was afterwards discharged on the report of the Judge that this was an error. On the argument of the rule Lord *Mansfield* said that enjoyment of light with the Defendant's acquiescence was such a decisive presumption of right by grant "or otherwise" (specifically mentioning as Lord *Ellenborough*, *Parke*, B., and *Story*, J., did, the alternative origin) that unless contradicted or explained a jury ought to believe it. And this view was affirmed by the Court of Queen's Bench in the subsequent case of

(1) 2 Wms. Saund. 175 a.
(2) Ibid.
(3) 2 Wms. Saund. 175 c.
(4) Ibid.

Cross v. *Lewis* (1). In that case the lights had been in existence for thirty-eight years, during twenty of which the adjoining premises had been in the possession of *Percy* as tenant, and there was no evidence that the reversioner, or his family, had ever been near the place. At the trial *Holroyd*, J., held the lights to be "ancient," and directed the jury to find a verdict for the Plaintiff. A rule was then moved for on the ground of misdirection in not leaving it to the jury to say whether they believed that notice of the enjoyment had or had not been given to the servient owner, which is the question raised by the Defendants in the case now before your Lordships. The Court, however, upheld the ruling of *Holroyd*, J., *Bayley*, J., saying that it had been always held since *Darwin* v. *Upton* (2), that in the absence of any evidence to rebut, after possession of twenty years a presumption of right arose "and that a jury should be *directed* to act upon it." He adds that if the neighbour objects to the windows he may put up an obstruction, but that is his only remedy; if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them. *Holroyd*, J., says they are "ancient lights," and the Plaintiff had a right by law to enjoy them. He adds, it is not a question to be determined by the jury unless there is evidence to contradict their being "ancient lights." At first they may be obstructed, but if no interruption is offered, the owner of them may prescribe for them as "ancient windows."

The result which I deduce from these authorities is that the *de facto* enjoyment is the origin of the right, and if that be not contradicted or explained, the jury may and should be directed to act upon it.

The cases relating to water, to which I have referred as of the third class, were greatly relied upon on the argument before your Lordships as shewing that no right at all could exist in the case of support, one of the reasons given for not implying any grant in those cases being that there could be no resistance on the part of the servient owner. They were cases of percolating water (*Chasemore* v. *Richards* (3)), which had not yet been confined and accustomed to run in a definite channel, or of air unconfined not having been taken into and enjoyed in a tenement through a definite aperture (*Webb* v. *Bird* (4)), and smoke (*Bryant* v. *Lefever* (5)). These cases seem, however, to me to be so essentially different from the case before your Lordships that it is unnecessary to consider them in detail. The principle which underlies them all I conceive to be that, until defined and confined, there is in those cases, as in light and air in its natural state, no subject matter capable of being the subject of a lawful grant, nor from the very nature of them can there be any definite occupation or enjoyment.

There remains only to be considered the last class of cases, viz., those relating to rights of way and common and easements of that description. But the distinction between such easements and the right to air and light was pointed out, as I have already said, by *Littledale*, J., in *Cross* v. *Lewis* (1) and again in *Moore* v. *Rawson* (6), which latter judgment was referred to with approval by the Court of Exchequer Chamber in *Webb* v. *Bird* (7). Such rights are unlawful in

(1) 2 B. & C. 686.
(2) 2 Wms. Saund. 175 *a*.
(3) 7 H. L. C. 349. S Jur N S 573
(4) 10 C. B. (N.S.) 268; 13 Ibid. 841. S Jur N S 621
(5) 4 C. P. D. 172.
(6) 3 B. & C. 339.
(7) 13 C. B. (N.S.) 841. S Jur N S 621

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their origin. The first of the acts is a trespass; whereas, in the case of light and support, the acts are in themselves lawful acts, done in the lawful occupation and user of a man's own land, and I do not think it useful to trouble your Lordships with any observations upon them.

I answer your Lordships' second question in the affirmative. As has been repeatedly stated, the enjoyment, which was originally necessary to found the presumption of right, must have had its commencement before the time of legal memory; but upon principles of public convenience, this period of antiquity has been clearly departed from, and the necessary limit has by successive stages been reduced to an enjoyment of twenty years, which is clearly sufficient to make a building or window "ancient."

I answer your Lordships' third question in the negative. If it be, as I think, absolutely settled law that the right depends upon the "*de facto*" enjoyment known to both parties, and acquiesced in by the servient owner, the measure of that right will not be such enjoyment as he may be able to prove to the satisfaction of a jury that the servient owner of the inheritance had actual notice of, but at least the actual enjoyment known and acquiesced in by the servient owner during the requisite period of enjoyment, or perhaps such enjoyment by the owner of the dominant building as the owner of it may be entitled to have for any purpose to which he may already have or may thereafter lawfully put it. The case of *Partridge* v. *Scott* (1) shews that, in order to confer the right, the enjoyment must be of such a nature as to indicate to the servient owner that the acquisition of a right of support is in progress, the Court of Exchequer holding that the right was not gained in that case because, although the existence of the house was patent, it was not known that it had only excavated soil for its vertical support.

In the case of light also a similar measure of enjoyment prevails. The rule in that case is, that the extent of light acquired is proportionate to the actual amount of enjoyment had: *Martin* v. *Goble* (2); *Lanfranchi* v. *Mackenzie* (3). There are, however, several authorities enlarging this right, and tending to shew that the dominant tenement has a right, not merely to the light actually enjoyed for the twenty years during which it had been accruing, but to all the light and air which will come through the window, and which may be necessary for any ordinary and lawful purposes for which the building has been, or at any future time may be, used, and this view has recently been adopted by the Queen's Bench Division in the case of *Moore* v. *Hall* (4). Whether this view is consistent with the principles upon which the acquisition of the right of light and air depends, and the earlier authorities, it is not necessary now to consider, for the limitation of the right to that degree of enjoyment which has been had during the twenty years is sufficient for the determination of the present case. In the present case it is admitted that the actual enjoyment of the Plaintiff's building in its altered state has existed for more than that period, and the only question, therefore, that it is necessary to determine is whether that enjoyment was or might have been known by the Defendant's predecessors in title so as to indicate to them that the right was being acquired. In the case of light all that the servient owner knows or has the means of knowing is the area of the apertures through which the light

(1) 3 M. & W. 220.
(2) 1 Camp. 320.
(3) Law Rep. 4 Eq. 421.
(4) 3 Q. B. D. 178.

passes. He has no notice of the size of the rooms, or of their distribution, or the objects for which the light is required. It may be that the light is used for a hall or a kitchen requiring the most ordinary degree of light, but it may be (as in *Lanfranchi* v. *Mackenzie* (1)) used for a room for examining samples, purposes requiring a special degree or quality of light, and yet if the servient owner obstruct the light necessary for such user, although it is more than, or different in quality, from that which is required for the ordinary purposes of a house, he will be liable to an action; in other words he is violating a right acquired by his neighbour's actual enjoyment.

It has been said that in this case the Defendant and his predecessors in title did not see, and could not know, the quantity of support required by the Plaintiff's house after the alterations. But the enjoyment, in fact, of the support was known, or might be known, to everybody, and I think that under such circumstances the servient owner must be held, upon presumption of public convenience, to know that the support which is being enjoyed is that of the weight of such a building constructed and used for any ordinary purpose of pleasure or business for which it is calculated. Whether the alterations in the Plaintiff's premises had the effect of throwing more weight upon the Defendant's soil than the original structure did, is a matter, no doubt, which might be open to contest, and if those alterations had been made at any time within the last twenty years a different question might have arisen from that now before your Lordships. But, assuming that the messuage had been built in the mode to which it is now altered, could it have been said that it had not become "ancient," and, as it has stood in that state for twenty-seven years, why is it not in its altered state "ancient?" These alterations were openly made, and the premises have been as openly enjoyed as (or probably from the particular nature of the business more openly enjoyed than) other buildings with a capacity for enjoyment for like purposes.

In the case of any house which openly enjoys the support of neighbouring land, does the neighbour ever know, even approximately, what extra weight his land has to bear beyond the weight of the soil which it is bound as of right to bear? By what process would a neighbour, in any ordinary case, know how far he might safely dig so as not to let down the soil of the adjoining owner, and yet dig just as far as he wished without bringing down the building? If every owner of a building were required, in cases where the enjoyment has been had for long periods (and be it recollected there is no other dividing line after you have passed twenty years until *Richard* I. is reached), to prove the existence of all the circumstances which would go to make up a grant binding upon the owner of the neighbouring inheritance, in how many cases could he support the burden, and what would be the number of now existing houses in England the owners of which would not find themselves liable to have their enjoyment of support put an end to? To leave the questions which would be involved in such cases to juries instead of letting the solution of them depend upon a clear and absolute settled rule of law would in my judgment introduce great uncertainty in title and much real injustice. In truth the burden imposed upon the servient owner is not a very heavy one. Before it could exist he had twenty years in which to make any lawful use of his own property. He has the corre-

(1) Law Rep. 4 Eq. 421.

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lative right of support of his own property, and all that he has to do if he wants to alter the state of the property is to leave sufficient soil to support the wall. Or if he wishes to remove all the soil, he has but to provide temporary strutting and supports, whilst the well-understood process of underpinning is being carried on. When the extensive substitution of enormous for smaller buildings which has within the last thirty years under the law as now understood been going on is considered, and that so little litigation has ensued upon it, it does not appear to me that there can be any great injustice or hardship in leaving the rule as it is.

In answer to your Lordships' fifth question, I think that the direction of the learned Judge was right. The Plaintiff had given affirmative evidence of the actual enjoyment by his building in its altered condition for twenty-seven years, and it was in no way proposed to offer any denial, explanation, or modification of this actual enjoyment. It is unnecessary, therefore, to consider the question what rebutting evidence (if any) might or might not in cases similar to the present be given; it is enough to say that no such was suggested here. The learned Judge offered to admit proof that the wall would not have fallen if it had not been for the weight imposed upon it, but that offer was declined, and, for the reasons I have stated, the right does, in my judgment, not depend upon whether the owner of the tenement has or has not had actual notice of the degree of support required, or of the precise circumstances upon which that depends. In the present case, as in *Darwin* v. *Upton* (1) and *Cross* v. *Lewis* (2), I think the jury were bound to act upon the "decisive" presumption thus afforded of the existence of the right, and that the learned Judge was right in so holding. I am unable to see what necessity there was for or what advantage could have been gained by his leaving any question to them. They would either have done their duty and given their verdict in accordance with the presumption as directed, or they would have found a verdict in defiance of this direction. In the former case the result now arrived at would have directly followed the verdict. In the latter case, the Court, if they considered the direction right as I do, and the verdict wrong, would under Order 40, Rule 10 of the rules under the Judicature Act, having all the materials before it, have declined to act upon the verdict and have entered judgment for the Plaintiff.

LINDLEY, J.:—My Lords, the first question put to us by your Lordships must, in my opinion, be answered in the affirmative. The current of authority on this point from *Palmer* v. *Fleshees* (3) down to the present time is unbroken. No trace of any doubt about it can be found: and no Judge by whom this particular case has hitherto been considered has questioned it.

The second question cannot be so easily answered. It appears to me to depend on the view a jury might take of the facts of this particular case, and, in particular, of the peculiar construction of the Plaintiff's house.

The following legal propositions bearing on this question appear to be settled beyond controversy:—

(*First.*) The owner of an ancient building (*i.e.* of a building so old that the

(1) 2 Wms. Saund. 175 c. (2) 2 B. & C. 686.
(3) 1 Sid. 167.

non-existence of it cannot be proved) has a right of action against the owner of land adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land.

(*Secondly.*) The owner of a building which has in fact been supported by his neighbour's land for twenty years has, *primâ facie* at all events, a right of action against the owner of the adjoining land if he disturb that land so as to take away the support afforded by it. This proposition is I conceive only open to doubt on the ground that it is not wide enough; but to the limited extent here stated all the authorities seem in accord, and no Judge has questioned it. The authorities to which I refer are *Stansell* v. *Jollard* (1); *Wyatt* v. *Harrison* (2); *Partridge* v. *Scott* (3); *Hide* v. *Thornborough* (4); *Humphries* v. *Brogden* (5); *Gayford* v. *Nicholls* (6); *Rowbotham* v. *Wilson* (7); *Rogers* v. *Taylor* (8); *Solomon* v. *Vintners' Company* (9); *Hunt* v. *Peake* (10); *Bonomi* v. *Backhouse* (11). These cases will all be found examined and discussed by the Queen's Bench Division and the Court of Appeal, and I forbear, therefore, to trouble your Lordships with more than their names.

(*Thirdly.*) The owner of a newly-erected building has no such right of support unless his neighbour has conferred it upon him. This proposition is, in my opinion, as clearly settled as the other two. The authorities in support of it are *Wilde* v. *Minsterley* (12); *Wyatt* v. *Harrison* (2); *Partridge* v. *Scott* (3); *Humphries* v. *Brogden* (5); *Gayford* v. *Nicholls* (6); all of which are commented on in the judgment of *Brett*, L.J.

From the first and second of the above propositions it follows, that a right to lateral support in respect of buildings may be acquired by English law, and may be acquired in modern times; whilst from the third proposition it follows that the right is not a mere incident to the ownership of land. *Bonomi* v. *Backhouse* (13) is said to be opposed to this view, but I cannot so regard it; for in that case the Plaintiff's house was an ancient house, his land was let down, and nothing turned on the pressure exerted by the house itself. The Plaintiff clearly had and was assumed to have a right of action; and the only question raised and decided was when his right of action accrued. Combining the same propositions and having regard to the language of the decisions which support them, it further follows that lapse of time is essential to the acquisition of a right to have a building supported by the land of another person, and that such right is by English law an easement, or a right in the nature of an easement. A little reflection, however, will suffice to shew that the easement of lateral support is of a peculiar kind; it is not a purely negative easement like the right to light; for support, even when lateral, involves pressure on and an actual use of the laterally

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(1) 1 Selw. N. P. 11th ed. 457.
(2) 3 B. & Ad. 871.
(3) 3 M. & W. 220.
(4) 2 C. & K. 250.
(5) 12 Q. B. 739.
(6) 9 Ex. 702.
(7) 6 E. & B. 593; 8 E. & B. 123; 8 H. L. C. 348.
(8) 2 H. & N. 828.
(9) 4 H. & N. 585.
(10) Joh. 705.
(11) E. B. & E. 622, 646; 9 H. L. C. 503.
(12) 2 Roll. Abr. 564, tit. Trespass I. pl. 1.
(13) E. B. & E. 622; 9 H. L. C. 503.

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supporting soil. Further, the actual enjoyment of lateral support is incapable of interruption by physical means, except by the removal of the soil which affords the support; or, in other words, by the destruction more or less of the servient tenement. Notwithstanding the first peculiarity, no trace is to be found in our law books of any action at law or suit in equity based upon any wrong done to the owner of the servient tenement; and the general opinion certainly is that in the absence of actual damage to the soil, no such action or suit could be maintained. Upon principle, I confess I do not see why this should be so. If a person builds so near the edge of his own land as to use his neighbour's land to support his house without his neighbour's consent, I do not see why such neighbour should have no cause of action. The enjoyment of light coming across adjoining land and the enjoyment of the use of such land for support are in some respects entirely different; for no use is made of a man's property by opening a window on other property near it; and a right not to be overlooked is not recognised by our law. At the same time in every case in which the right to lateral support is alluded to, it is treated as analogous to the right to light, and the difference to which I have drawn attention has not been dwelt upon or treated as material. Nevertheless, whatever my own opinion would be, looking at the matter theoretically, I am not prepared to say that an action for damages or an injunction could be maintained in such a case as I have supposed. The authority against it, although purely negative, would, in my judgment, be considered as too strong to be got over. If, however, your Lordships should be of a different opinion, I apprehend that it would follow that the Prescription Act (2 & 3 Will. 4, c. 71, s. 2) would apply to and include an easement of lateral support; and the law upon this important subject would then be contained in the provisions of that statute. But all the Judges before whom this case has come, concur in holding the Prescription Act not to apply; and, in the absence of authority to the contrary, I am not prepared to differ from them.

As regards the practical possibility of physically obstructing the use of one's land by another for the support of his own house it is to be observed:—

1. That in a literal, *i.e.*, merely mechanical sense, such obstruction is always possible;

2. That it is possible only by a removal of the soil used for support;

3. That such removal may or may not be convenient to its owner; he may or may not require to remove it for purposes of his own;

4. That, if he does not require to remove it for his own purposes, a law which renders it necessary for him to remove it in order to preserve his unrestricted right to do so at some future time, does not commend itself to common sense; for if his land is itself already built upon, such a law would impose upon him the necessity of removing part of his own property, and to destroy, or to incur great expense in order to avoid destroying, more in order to preserve his rights intact. In these respects the power of preventing the acquisition of a right to light, and the power of preventing the acquisition of a right to lateral support are very different; but notwithstanding these differences every authority on the subject treats the right to such support as capable of being acquired in the same way as the right to light. *Stansell* v. *Jollard* (1); *Hide* v. *Thornborough* (2); *Gayford*

(1) 1 Selw. N. P. 11th ed. 457. (2) 2 C. & K. 250.

v. *Nicholls* (1); *Partridge* v. *Scott* (2); *Rowbotham* v. *Wilson* (3); *Rogers* v. *Taylor* (4); and *Humphries* v. *Brogden* (5) all support this view, and are inconsistent with any other. In the face of this current of authority I am unable to come to the conclusion that the physical difficulty of obstruction brings the right to lateral support within the cases of *Webb* v. *Bird* (6); *Chasemore* v. *Richards* (7); and *Sturges* v. *Bridgman* (8); for if those cases applied, the right to lateral support could not be acquired at all by mere enjoyment however long continued; and in my opinion the authorities to which I have referred clearly establish that it can be so acquired under circumstances to which I propose now to allude.

The authorities already referred to appear to me to establish that a right to lateral support, although not within the *Prescription Act*, and although in many respects unlike a right to light, can be acquired in the same way and under the same circumstances as a right to light could be acquired before that Act passed. A careful study of those authorities has driven me to this conclusion, from which I see no escape. Without going over the cases so exhaustively examined and discussed in the Courts below it will be sufficient, after the observations already made, to say that the view taken by *Cotton* and *Thesiger*, L.JJ., on the mode of acquiring a right to light independently of the *Prescription Act* appears to me to be more correct than the views taken by *Lush*, J., on the one side, and by *Cockburn*, L.C.J., and *Mellor*, J., and *Brett*, L.J., on the other. The absence in fact of a grant, meaning thereby a deed under seal, cannot in my opinion be conclusive against the Plaintiff. An agreement for valuable consideration, though not under seal, is sufficient to create a right to an easement, and for the purpose of creating a lawful user is as good as a deed. Again, assent or acquiescence on the part of the Defendants to the erection of the Plaintiff's building with a knowledge of its peculiar mode of construction would, in the absence of any deed under seal, entitle the Plaintiff to maintain this action: see *Brown* v. *Windsor* (9).

The theory of an implied grant was invented as a means to an end. It afforded a technical common law reason for not disturbing a long continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested the presumption in favour of its legality ought to be made. Nor am I aware of any instance in the equity reports in which it has been held that an easement openly and uninterruptedly enjoyed for twenty years has been destroyed simply by proof that no grant under seal was ever in fact made. The theory of an implied grant, as distinguished from a legal presumption of some lawful origin, is, in my opinion, untenable and practically misleading, especially now that principles of equity as well as of law have to be applied both to trials with juries and to trials without. I feel a difficulty in saying that acquiescence on the part of the Defendant is essential to the acquisition by the Plaintiff of a right to

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(1) 9 Ex. 702.
(2) 3 M. & W. 220.
(3) 6 E. & B. 598; 8 E. & B. 123; 8 H. L. C. 348.
(4) 2 H. & N. 828.
(5) 12 Q. B. 739.
(6) 13 C. B. (N.S.) 841.
(7) 7 H. L. C. 349.
(8) 11 Ch. D. 852.
(9) 1 Cr. & J. 20.

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support. No one can be properly said to acquiesce in what he cannot prevent; and it rarely happens that the use of land for lateral support can be practically prevented. Express dissent, *i.e.*, an express protest, would no doubt negative assent; and if acquiescence by the owner of the servient tenement is essential to the acquisition of a right to lateral support, a protest by him ought to be sufficient to prevent its acquisition. But I can find no trace of any authority to the effect that a protest would suffice for that purpose in this case any more than in other cases more or less similar, and I understand *Cross* v. *Lewis* (1) to be an authority against the sufficiency of a protest in a case of light. Further, it is difficult to see why a protest should be required to preserve a right which is not being infringed. A protest is evidence of dissent, but nothing more, and until it is shewn that assent is important, dissent cannot be of any avail. The only way in which I can reconcile the authorities on this subject is to hold that a right to lateral support can be acquired in modern times by an open uninterrupted enjoyment for twenty years, and that if such an enjoyment is proved the right will be acquired as against an owner in fee of the servient tenement, unless he can shew that the enjoyment has been on terms which exclude the acquisition. Whether he has assented or not, even if he has dissented, appears to me immaterial, unless he has disturbed the continued enjoyment necessary to the acquisition of the right. In the absence of an uninterrupted open enjoyment the right cannot be acquired, and the answer to your Lordships' second question appears to me to turn on whether the enjoyment in this particular case was open; and this again appears to me to be a question of fact which ought to have been left to the jury. The learned Judge who tried the case considered that as the Plaintiff's building was openly built and enjoyed, it followed that he had openly enjoyed the support which he in fact had had. I do not think that this is a necessary inference; for the building was very peculiarly constructed, and I agree with *Cotton* and *Thesiger*, L.JJ., that the jury should have had their attention called to this point, and have been asked whether the Plaintiff had in fact openly enjoyed the support the right to which he claimed. My answers to the third, fourth, and fifth questions will shew more fully what I mean here to convey. Open enjoyment of the lateral support, a right to which is claimed, is in my opinion a condition of the acquisition of the right, because by English law a right to lateral support for a building is treated as an easement; and easements cannot be acquired unless their enjoyment has been open. The necessity for open enjoyment in cases of lateral support is stated in or to be inferred from the language of the decisions in *Hide* v. *Thornborough* (2), *Gayford* v. *Nicholls* (3), *Partridge* v. *Scott* (4), and *Humphries* v. *Brogden* (5). Moreover, the reason for requiring open enjoyment exists, although it is not cogent or obvious in the case of lateral support as it is in the case of other easements, the acquisition of which can be more easily prevented.

In answer to your Lordships' third and fourth questions, for the reasons already given, I am of opinion that it is incumbent on the Plaintiff to prove an open enjoyment of the right he claimed. But if he proves such open enjoyment it is not in my opinion necessary for him to adduce further evidence to prove that the

(1) 2 B. & C. 686.
(2) 2 C. & K. 250.
(3) 9 Ex. 702.
(4) 3 M. & W. 220.
(5) 12 Q. B. 739.

Defendants or their predecessors in title had knowledge or notice of the alterations made in 1849, or of the effect of such alterations in order to make the damages done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong. What is proof of open enjoyment will appear from my answer to the next question.

In answer to your Lordships' fifth question, for the reasons already stated, I am of opinion that the course taken by the learned Judge at the trial in directing a verdict for the Plaintiff was not correct. He ought to have left the jury to decide the question of open enjoyment by the Plaintiff of the right he claimed. In order to make this question intelligible to jurymen they should be told that they ought to consider that the Plaintiff had openly enjoyed all that support which any reasonably competent person, seeing the ground and the Plaintiff's building (but knowing nothing of its peculiarities), would infer it required when used for the purposes for which it was apparently constructed and adapted; but any support which in fact the building might require beyond this ought not to be considered as openly enjoyed, unless the necessity for such additional support was in fact known to the Defendants or their predecessors in title. In the great majority of cases the existence and nature of the building will render it unnecessary to investigate such a question as this; for it is only in cases of an unusual character that a building requires more support than any competent person seeing it would suppose. But in my opinion the Plaintiff's building in this case was so peculiarly constructed as to render it quite possible for the Defendants to prove, first, that the Plaintiff had enjoyed more support than any one would infer from the nature and character of his building, and, secondly, that the building fell by reason of the withdrawal of such extra support, which, although enjoyed in fact, had not been enjoyed openly or to the knowledge of the Defendants or their predecessors in title. If the Defendants had succeeded in proving these points they would in my judgment have been entitled to a verdict; and it is because they had no opportunity of giving such proof that I think there ought to be a new trial. A direction to the jury to the effect above-mentioned would not only be in accordance with law as I understand it, but would also, I think, be free from practical difficulties or objections; for it comes to this, that, speaking generally and excluding cases of settled estates and other anomalous cases, the owner of a house which has existed for twenty years is entitled to such support as any one acquainted with building can see the house requires, but not to more unless he can shew actual notice of enjoyment of more.

LOPES, J.:—My answers to the questions put to me by your Lordships are the same as those contained in the opinion of my Brother *Lindley*, and I give them after having carefully perused and considered the opinion he has read to your Lordships, and for the reasons stated in it.

MANISTY, J.:—My Lords, I concur in the opinions expressed by my learned Brothers *Pollock* and *Field* in answer to all the questions submitted by your Lordships to the Judges. Nevertheless I think it right to make some supplementary observations of my own with reference to the first, second, and fifth questions, each of which ought in my opinion to be answered in the affirmative. I found that opinion upon the following propositions:—

(1.) That the right to lateral support for buildings from adjacent soil is not

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the right to an easement in or over that soil, but is a right of property, namely, the right of the owner of the buildings to enjoy his property free from interruption by his neighbour, even though that interruption be caused by acts done by his neighbour in his own land which are in themselves lawful.

(2.) That this is not a natural right but a right of property, which when acquired is of the same character as a natural right.

(3.) That a house, or building which has stood for upwards of twenty years is in the eye of the law an "ancient" house or building.

(4.) That the law presumes, *until the contrary is proved*, that the owner of an ancient house, or building, who has enjoyed it free from interruption by a neighbouring proprietor for upwards of twenty years, has acquired the right so to enjoy it for the future.

(5.) That the contrary may be proved as I shall afterwards shew; but the presumption of law cannot be rebutted by merely proving that no grant of support was in fact ever made by the neighbouring proprietor.

In support of these propositions I shall consider in the first place what is the true character of the right in question, because it seems to me that this goes to the root of the case. And in this I am fortified by what *Brett*, L.J., said in giving judgment in the Court of Appeal in the case now under consideration He is reported to have said (1): "The first question to be determined is whether the right claimed is a right of property, for if it is, it is unnecessary to inquire further in this case, the Plaintiff being clearly entitled to succeed." His Lordship having expressed that opinion proceeded to consider whether the right claimed was a right of property or a right to an easement, and came to the conclusion that it was the right to an easement. From that conclusion I venture respectfully to differ. No doubt for many years the right of lateral support for buildings from adjoining soil was considered and treated as the right to an easement, and consequently in order to maintain the right the fiction of a lost grant was resorted to, and juries were directed that they ought to find *as a fact* that which they and every one else knew was *not* the fact. The right was sometimes called an "easement" *simpliciter*, sometimes a "negative easement," but in 1857, in the case of *Rowbotham* v. *Wilson*, in the Exchequer Chamber (2), *Cresswell* and *Williams*, JJ., and *Martin* and *Watson*, BB., expressed a strong opinion that it was one of the ordinary rights of property and not an easement. *Bramwell*, B., said (3): "After a house has stood for twenty years it acquires a right to support from adjoining land." The case of *Bonomi* v. *Backhouse* (4) was decided by the Court of Queen's Bench in the following year (1858). 'The right claimed in that case and the mode of acquiring it were in all material circumstances identical with those in the present case, and the four eminent and learned Judges who heard it were unanimously of opinion that the right of lateral support for an ancient house from neighbouring soil is not an easement acquired by grant but a proprietary right, which may be acquired by uninterrupted enjoyment for upwards of twenty years. Lord *Campbell*, in giving judgment, said: "I agree in the opinion that the right of support which the Plaintiffs claim is a

(1) 4 Q. B. D. at p. 191.
(2) 8 E. & B. 123.
(3) 8 E. & B. at p. 140.
(4) E. B. & E. 622.

natural right of property to be presumed till, as in *Rowbotham* v. *Wilson* (1), evidence is given to rebut that presumption, and that such a right is not to be considered an easement or servitude arising from grant." *Coleridge*, J., said: "It seems to me that the interest which the Plaintiffs allege in themselves and to have been injured by the Defendant, is in the nature of a right growing out of ownership, or incident to the ownership of land, and not an easement on the land of another arising from grant or in any other way." *Erle*, J., said: "Upon the facts as stated by *Wightman*, J., I am of opinion that the right to support is one of the ordinary rights of property, and not an easement or right acquired by grant or otherwise." *Wightman*, J., said: "Upon consideration of all the cases it appears to me that the cause of action in such a case as the present is founded upon a breach of duty on the part of the Defendant, by so using his own property as to injure that of his neighbour, and not upon any right of the Plaintiffs to an easement in upon or over the land of their neighbours. Where *ancient* buildings are standing upon the Plaintiffs' land, the Defendant must take care not to use his own land in such a manner as to injure them." The learned Judges, though unanimous as to the character of the right claimed and the mode of acquiring it, differed as to the effect of the *Statute of Limitations*, three of them being of opinion that the statute began to run from the time when the adjacent soil was removed; the fourth (*Wightman*, J.), holding that it did not begin to run till the Plaintiffs' house was injured, and accordingly judgment was given for the Defendants. The case was taken upon appeal to the Exchequer Chamber. It was argued before *Willes* and *Byles*, JJ., and *Martin*, *Bramwell*, and *Watson*, BB. (2), the three Barons being three of the Judges who expressed the opinion to which I have already adverted in *Rowbotham* v. *Wilson* (1). The Court unanimously gave judgment for the Plaintiffs, affirming the judgment of the Queen's Bench as to the Plaintiffs' right to support, but reversing it on the ground that the *Statute of Limitations* was not a bar to the action, as it would have been if the right claimed had been that of an easement. In delivering the judgment of the Exchequer Chamber, *Willes*, J., said: "The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them; but the character of the right when acquired is in each case the same." *Bonomi* v. *Backhouse* came before this House by way of appeal in 1869 (3). The judgment of the Exchequer Chamber was affirmed. In giving judgment Lord *Wensleydale* said: "I think it perfectly clear that the right claimed is not in the nature of an easement, but to the enjoyment by the Plaintiff of his own property, the obligation being cast upon the owner of the neighbouring property not to interrupt that enjoyment." But for opinions expressed to the contrary by very learned and eminent Judges in the Courts below, in the case now under consideration, I should have thought that the character of the right claimed and the mode of acquiring it were settled and conclusively established by the cases of *Rowbotham* v. *Wilson* (1), *Bonomi* v. *Backhouse* (4), and *Backhouse* v. *Bonomi* (3); and I cannot help thinking that the opinions of the two very learned Judges (the late Lord Chief Justice of *England* and *Brett*, L.J.),

(1) 6 E. & B. 593; 8 E. & B. 123; 8 H. L. C. 348.
(2) E. B. & E. 646.
(3) 9 H. L. C. 503.
(4) E. B. & E. 622.

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who delivered judgments in favour of the Defendants in the present case, must have been founded upon a misconception of the facts which existed in the case of *Bonomi* v. *Backhouse* (1). I proceed to state my reasons for thinking so. In *Angus* v. *Dalton* (2), the late Lord Chief Justice *Cockburn* is reported to have said: "The cases of *Rowbotham* v. *Wilson* (3) and *Bonomi* v. *Backhouse* (1) are not at all in point. The right of support there claimed was not of lateral but of vertical support, and was not in the nature of an easement but of a proprietary right, the right of the owner of the surface land to have the support of the strata below as of absolute right independently of user or of right acquired by enjoyment. This distinction was expressly pointed out by Lord *Wensleydale* when the case of *Bonomi* v. *Backhouse* was before the House of Lords." Now in *Rowbotham* v. *Wilson* (3) the Plaintiff claimed the right of both adjacent and subjacent support. The instrument under which he acquired the surface shewed that he was not entitled to either; and judgment was given against him upon that ground, but the *dicta* of the Judges are in point. In *Bonomi* v. *Backhouse* (1) the right claimed was, as I have already said, identical with that claimed in the present case. It was not a claim to vertical support as supposed by the late Lord Chief Justice, but a claim to lateral support. It was not a claim by the owner of the surface land to have the support of the strata below as of absolute right independently of user or of right acquired by enjoyment; but it was a claim to lateral support of a house and outbuilding from the soil of the neighbouring proprietor acquired by user and enjoyment for forty years and upwards. In giving the judgment of the Exchequer Chamber in *Bonomi* v. *Backhouse*, *Willes*, J., summed up the whole case in these words (4): "The Plaintiff was owner of the reversion of an ancient house. The Defendants, more than six years before the commencement of the action, worked some coal mines 280 yards distant from it. No actual damage occurred until within the six years. Question, Is the *Statute of Limitations* an answer to the action?" and the Court held unanimously that it was not. It was in view of, and with reference to, the facts as found by the arbitrator, and stated by *Willes*, J., and not of the facts as stated by the late Lord Chief Justice, that Lord *Wensleydale* made the observations which the late Lord Chief Justice, strangely as it seems to me, relies upon as shewing that the case of *Bonomi* v. *Backhouse* (1) is not in point. *Brett*, L.J., in giving judgment in the present case, said (5): "The judgments in *Bonomi* v. *Backhouse* (1) are to be applied to excavations which would have let down the Plaintiff's land though not built upon." His Lordship founds that assumption on the circumstance that there is no reference in the facts stated by the arbitrator, or in the arguments of counsel, to any distinction between the support necessary for the land, if it had been unbuilt upon, and that necessary for the buildings. The reason why no such reference was made (and this I know for a fact, having been counsel for the Plaintiffs from the commencement to the conclusion of the case) was that the findings of the arbitrator and the arguments of counsel were confined to the case made by the Plaintiffs, namely, that they were entitled to have their ancient buildings supported. There is not a trace in the

(1) E. B. & E. 622. 8 H. L. C. 348.
(2) 3 Q. B. D. at p. 130.
(3) 6 E. & B. 593; 8 E. & B. 123;
(4) E. B. & E. at p. 654.
(5) 4 Q. B. D. 195.

pleadings, or in the findings of the arbitrator, or in the arguments of counsel, of a claim to have the soil on which the house stood supported by the adjacent soil. Their case from first to last was that their buildings were ancient (that is to say, upwards of twenty years old), and that by reason of uninterrupted enjoyment during that period they had by law acquired the right to enjoy them free from interruption caused by acts done by their neighbours in the adjacent land. I am at a loss to understand why the judgments in *Bonomi* v. *Backhouse* (1) should be applied to a claim which was never made, and to facts which were not found, rather than to the claim which was made and the facts which were found.

It only remains for me to say a few words with reference to the fifth question submitted by your Lordships to the Judges. Assuming the right claimed to be a right of property such as I have endeavoured to shew it is, and that in the absence of any evidence to the contrary the law presumes it to have been acquired by uninterrupted enjoyment for twenty years and upwards, the question arises how may the contrary be proved. To this I answer, by evidence explanatory of the user, shewing affirmatively that the owner of the buildings holds his property subject to the right of the owner of the subjacent or adjacent soil to take away the support. Such was the evidence given in *Rowbotham* v. *Wilson* (2), *The Duke of Buccleuch* v. *Wakefield* (3), *Aspden* v. *Seddon* (4), and other cases which might be cited to the like effect. It may be that the presumption might be rebutted in some other way, such as by shewing that the owner of the adjacent or subjacent soil was under disability during the time when the right of support was alleged to have been acquired. It is unnecessary to express any opinion on that point as no such question arose in the present case. If the presumption be one of law, it follows that neither positive acquiescence, nor a grant of support as a matter of fact, by the owner of the neighbouring soil is requisite for the acquisition of the right in question. If the view I take of the case be correct, then the long recognised right of the owner of an ancient house to enjoy it free from interruption by his neighbour will be preserved, and it will henceforth be based upon fact and a sound principle of law, instead of, as heretofore, upon fiction and unseemly verdicts of juries.

FRY, J.:—My Lords, before specifically replying to the questions propounded by your Lordships, I think it desirable to express the views which I entertain upon the general subject of the right of the owner of a building to lateral support for that building by the land of an adjoining proprietor.

Such a right may be created by an actual instrument between the two owners. The right being, not to a thing to be done or used in the neighbour's soil, but to a limitation of the user of that soil by the neighbour himself, does not lie in grant, but would be created by a covenant by the neighbour not to use his own land in any manner inconsistent with the support of the adjoining buildings (see the judgment of *Littledale*, J., in *Moore* v. *Rawson* (5)), and such a covenant might either be express or might be inferred from the object and purport of the instrument, as in *Caledonian Railway Company* v. *Sprott* (6).

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(1) E. B. & E. 622.
(2) 8 E. & B. 123; 8 H. L. C. 348.
(3) Law Rep. 4 H. L. 377.
(4) Law Rep. 10 Ch. 394.
(5) 3 B. & C. 332, 340.
(6) 2 Macq. 449.

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Leaving the consideration of the right as constituted by actual contract between the parties, questions of great difficulty arise; and, in respect of these, I have most unwillingly arrived at the conclusion that principle and authority are in direct opposition to one another.

On principle it appears to me that it might well be held that every man must build his own house upon his own land, and that he cannot look to support from the land of adjoining proprietors. Such a principle would prevent the owner of a house from ever acquiring a right to lateral support except by actual contract. An opposite view might be taken, for which also much reason could be given. The right of soil to support by adjoining soil is given by our law as a natural right, and it might well have been held that this natural right to support carried with it a right to the support of all those burthens which man is accustomed to lay upon the soil. On this principle, the right to support would arise as soon as the house was built, and would exist independently of user, consent, or contract. It might thus, it appears to me, be reasonable to hold that a house should never have the right of support, or that it should always have it. But I am unable to find any principle upon which to justify the acquisition of the right to support by a house independently of express covenant or grant. For casting aside all technicalities, I think that the only principle upon which rights of a kind like the one in question can be acquired is that of acquiescence. But I further think that, as he who cannot prevent cannot acquiesce, and as the owner of adjoining land cannot prevent his neighbour from erecting a house upon his own land, he can never be said to have acquiesced in the construction of that house, or in the burthen which thence results. Such are the conclusions to which I should be driven by a consideration of this question on principle. When I turn to the authorities of our law bearing on the subject, I find, as it appears to me, that it has been decided that an ancient house does possess the right in question; that a new house does not possess this right; and, consequently, that the right is one which may be acquired independently of express covenant. All the efforts which I have made to find some principle upon which to justify the authorities, have to my own mind entirely failed.

I must now consider somewhat more in detail the views which I have thus briefly expressed. In the absence of express stipulation, rights of the kind to which the one now in question belongs, can, in my opinion, arise in law only from one or other of two sources, namely, either as incidents attached to property by nature herself, or as incidents attached to property by the force of long continued user under circumstances importing acquiescence in such user.

There is no doubt on the authorities that, as the support of soil by soil is in fact a result of nature, so the right to such support is given by the law as *ex jure naturæ*, and as a proprietary right. It arises in all its force the moment two adjoining pieces of land are held by different owners and has no connection with the user of the land: *Humphries* v. *Brogden* (1); *Rowbotham* v. *Wilson* (2). But it is equally clear on the cases that the right to support of buildings by land is not a right *ex jure naturæ*, but must arise by grant (or, as I think, more accurately speaking, by covenant). "Rights of this sort," said the Court of Exchequer in reference to the right of support of a house, "if they can be established at all,

(1) 12 Q. B. 739. (2) 8 E. & B. 123.

must, we think, have their origin in grant." (See *Partridge* v. *Scott* (1), and to the like effect are the judgments of the Queen's Bench in *Humphries* v. *Brogden* (2), and of the Exchequer Chamber in *Bonomi* v. *Backhouse* (3).)

That the right in question may be acquired, even where no instrument creating it is shewn, is established as a matter of positive law by a series of authorities which appear to determine, 1, that the owner of an ancient building has a right of action against the owner of land adjoining, if he disturb his land so as to take away the lateral support previously afforded by that land, and 2, that the owner of a new building has no such right. The cases on these points are so fully cited and discussed by *Lush*, J., in the Queen's Bench Division, and by *Thesiger*, L.J., in the Court of Appeal, that it will be sufficient to refer to these judgments for their details. Suffice it to add that the authorities, commencing in the year 1803, include rulings at Nisi Prius by Lord *Ellenborough*, Lord *Wensleydale*, and the late Lord Chief Justice of *England*; an expression of opinion by Lord *Blackburn*, and judgments by the Courts of Exchequer and Common Pleas which assert or involve the propositions referred to: and, though no clear authority of an earlier date is found, the distinction between a new and an old house as regards the right to support appears to be hinted at in the cases of *Wilde* v. *Minsterley*, 15 Car. 1 (4), and of *Palmer* v. *Fleshees*, 15 Car. 2 (5).

These cases constitute a body of authority, which, in my opinion, must be regarded as conclusive that, according to the law of *England*, an ancient house possesses a right to support from the adjoining soil; and, therefore, I answer your Lordships' first question in the affirmative.

From what I have said it follows that a right to support may, according to our law, be acquired independently of express contract; and, in order to answer your Lordships' second question, it becomes essential to inquire on what principle, in what time, and under what circumstances, it may be so acquired. Mere lapse of time can never, it appears to me, on any intelligible principle, confer a right not previously possessed; though lapse of time accompanied by inaction, where action ought to be taken, may well have such a result. "Mere lapse of time," said Chief Justice *Dallas* in *Gray* v. *Bond* (6), "will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Strictly speaking, the right in question cannot, I think, be prescribed for; for it is common learning that prescription can only be for incorporeal hereditaments "and cannot be for a thing which cannot be raised by grant" (7), and, as I have already shewn, the right in question, does not, in my opinion, lie in grant.

But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.

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(1) 3 M. & W. 228.
(2) 12 Q. B. 739.
(3) E. B. & E. 646, 654.
(4) 2 Roll. Abr. 564, Trespass, I. pl. 1.
(5) 1 Sid. 167.
(6) 2 B. & B. 671.
(7) 2 Bl. Com. bk. ii. c. 17; 21st Ed. p. 264.

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It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, 1st, the doing of some act by one man upon the land of another; 2ndly, the absence of right to do that act in the person doing it; 3rdly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the Courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases.

As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb.

Qui non prohibet quod prohibere potest, assentire videtur (1); per *Parke*, B, in *Morgan* v. *Thomas* (2): *Contra non valentem agere, nulla currit præscriptio* (*Pothier, Traité des Obligations*, Part iii., Chap. viii., art. 2, § 2; *Broom's* Maxims, 5th ed., 903), are two maxims which shew that prescription and assent are only raised where there is a power of prohibition.

And again, the cases of *Chasemore* v. *Richards* (3), *Webb* v. *Bird* (4), and *Sturges* v. *Bridgman* (5), have established a principle which was stated by *Willes*, J., in *Webb* v. *Bird* (6), in these terms. After alluding to the law relative to lights as exceptional, he proceeded, "In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labour and expense." "Consent or acquiescence," said *Thesiger*, L.J., in delivering the judgment of the Court of Appeal in *Sturges* v. *Bridgman* (7), "of the owner of the servient tenement lies at the root of prescription and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi, nec clam, nec precario*, for a man cannot, as a general rule, be said to consent or to acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which

(1) Co. Inst. 2nd part, vol. i. p. 305.
(2) 8 Ex. 304.
(3) 7 H. L. C. 349.
(4) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841.
(5) 11 Ch. D. 852.
(6) 10 C. B. (N.S.) at p. 382.
(7) 11 Ch. D. 862.

he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence."

Assuming such to be the true grounds and principles of acquiescence, I next inquire how they can be applied to the question of the right of a house to be supported by the adjoining land.

It has been argued at your Lordships' Bar that the doctrine applies in its simplest form to the right in question; for it has been contended that the act of building a house on one piece of land which derives lateral support from the adjoining soil of a different owner is both actionable and preventible, and that, therefore, time constitutes a valid bar. Is such a building actionable? I think not. The lateral pressure of a heavy building on soft ground which causes an ascertainable physical disturbance in a neighbour's soil would no doubt be trespass; but no one ever heard of an action for the mere increment caused by reason of a new building to the pre-existing lateral pressure of soil on soil, producing no ascertainable physical disturbance. If that were the law no one could rightly build on the edge of his land, unless he built upon a rock; and yet the building of walls and other structures on the borders of land is universally recognised as lawful. Nay more, any erection of a house would give a right of action not only to the adjoining neighbours, but to every owner of land within the unascertainable area over which the increase of pressure must, according to the laws of physics, extend. Such an increase of pressure when unattended with unascertainable physical consequences is, in my opinion, one of those minima of which the law takes no heed. The distinction between the principles applicable to water collected into visible streams and that running in invisible ones through the ground, affords a very good analogy to the distinction which I draw between the pressure of an adjoining house which produces a visible displacement of the soil, and that which produces no visible or ascertainable result, but is only a matter of inference from physical science or subsequent experiment.

Is the support of the house by the adjoining soil preventible? I think not. It is of course physically possible for one man so to excavate his own soil as to let down his neighbour's building, and a man may or may not have occasion to excavate his own land for his own purposes, but such an excavation for the sole purpose of letting down a neighbour's house is of so expensive, so difficult, so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right. In fact in the case of adjoining houses, it would be to require a man to destroy his own property in order to protect his rights to it.

In the case of air, it is physically possible for the adjoining owners to build a lofty wall round a windmill and shut out the access of air; and in case of underground water it would, at least in some cases, be physically possible to construct a water-tight barrier through all the water-bearing strata of the soil; but such acts would require such an unreasonable waste of time and money that the not doing of them has been held to import no acquiescence in the flow of air and water respectively: *Chasemore* v. *Richards* (1); *Webb* v. *Bird* (2).

(1) 7 H. L. C. 349. 5 Jur N.S. 873

(2) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841. 8 Jur N.S. 562

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If the building of a house by one man which derives support from the adjoining land is neither actionable nor preventible by the owner of the adjoining soil, it seems difficult to see on what principle a covenant as to the user of his own soil can be inferred against the man who can do nothing.

The right to support and the rights to the access of light and air are very similar the one to the other, and are broadly distinguished from most other easements or analogous rights. They are negative as contrasted with affirmative easements. They are analogous with *servitutes ne facias* in the civil law. Such rights when they arise spring, not from acts originally actionable or unlawful on the part of the dominant owner, but from acts done on his own land and within his own rights; they confer on the dominant owner not the right to use the subject, but a right to forbearance on the part of the owner from using the subject, *i.e.*, they create an obligation on the owner of the servient tenement not to do anything on his own land inconsistent with a particular user of the dominant tenement (1). They rest on a presumption or inference not of a grant by the neighbour of a right to do something on the grantor's land, but of a covenant by the owner not to do something on his own land.

It is difficult in principle to see how such rights can arise from the doing of lawful acts on the dominant tenement, except in the few cases where the owner of the servient tenement can both lawfully and with reasonable ease interfere to prevent the continued user by his neighbour.

The close likeness between the right to support and to light has been much pressed on your Lordships, as a reason for inferring a right to support by analogy with the cases which before the *Prescription Act* established the right to light. The peculiarity of these cases is that the Courts required the servient owner to submit to the acquisition of the right by his neighbour or to signify his dissent by putting up an actual obstruction. "If his neighbour objects to them" (*i.e.*, to the windows) said *Bayley*, J., in *Cross* v. *Lewis* (2), "he may put up an obstruction, but that is his only remedy." This rule as to light appears to have arisen without any full discussion in the Courts of the principle on which it rests. But it is plain that the erection of an obstruction was thought so slight a matter that it might reasonably be demanded of the servient owner to negative acquiescence on his part. This rule I consider to be an anomaly, and therefore as not furnishing any principle which ought to be extended. "It is going very far," said Lord *Wensleydale* in *Chasemore* v. *Richards* in your Lordships' House (3), "to say that a man must be at the expense of putting up a screen to window lights to prevent a title being gained by twenty years enjoyment of light passing through a window." "These cases," said *Willes*, J., in *Webb* v. *Bird* (4), "as compared with the general law are anomalous." "The case of the right to light before the statute stood on a peculiar ground," said *Blackburn*, J., in the same case, in the Exchequer Chamber (5). "Anyone," said *Bramwell*, L.J., in *Bryant* v. *Lefever* (6), "who reads the cases relating to the acquisition of a right to light, will see that there has been great difficulty in establishing it on principle."

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(1) 2 Austin, Jurisp. 836, 3rd Ed.
(2) 2 B. & C. 689.
(3) 7 H. L. C. 386.
(4) 10 C. B. (N.S.) 285.
(5) 13 C. B. (N.S.) 844.
(6) 4 C. P. D. 177.

Accordingly, in *Chasemore* v. *Richards* (1), your Lordships' House declined to apply the analogy drawn from lights to water passing through the earth in unascertained courses, and the Courts of Common Pleas, Exchequer Chamber, and Appeal, have declined to apply it to the cases of air (*Webb* v. *Bird* (2), *Bryant* v. *Lefever* (3)), and of noise (*Sturges* v. *Bridgman* (4)).

Lastly, the way in which the *Prescription Act* deals with the right to light is significant of its anomalous character. It deals, on the one hand, with easements of an affirmative character which are capable of interruption by the servient owner. It deals, on the other hand, not with negative easements generally, but with the right to light alone of all the class to which it belongs. I believe that this argument, derived from the law of lights, has exercised a great influence on the establishment of the right to support, but I consider that in principle it affords no justification for the establishment of such a right. In order that acquiescence may arise there must, in my opinion, be the power to prevent; and this I conclude, for the reasons I have given, is wanting in the case of the support of buildings by adjoining soil. But there is, in my humble opinion, equally wanting another element, namely, knowledge in the owner of the servient tenement. No doubt the owner of property knows or must be taken to know what occurs openly and visibly on his estate or in its immediate neighbourhood, but not that which takes place underground or in a secret manner. Hence he is justly charged with knowledge that his neighbour walks habitually over his land, or has erected a house with windows deriving light over his fields: but he would not be affected with knowledge of the user of a gangway or gallery constructed in the course of secret mining operations. Now the question whether a building does or does not derive any practical support from the neighbouring land is one which it appears to me often extremely difficult to answer even for the building owner, and far more difficult to answer for the adjoining owner, who may be ignorant of the nature of the structure erected behind a hoarding—of the incidence of its burden on the soil—of the depth and character of the foundations, whether extending to the rock or resting on the surface soil—and of the nature of the subsoil itself. He may indeed excavate his own land and probably answer the last of these questions; but on the other topics he has no certain means of information, except by a trespass or an impertinence. It is evident that where the building is on the outcrop of strata, or where the beds have been intersected by dykes or disturbed by faults, it would be difficult or impossible to tell what is the incidence of the burden created by a house except by actual excavation and experiment. The circumstances of the case render it, in my opinion, unjust to impute to a neighbour that plain knowledge of what is going on in his neighbourhood which can alone justify the depriving a man of a right to use his own land in a lawful manner.

In the case of *Solomon* v. *Vintners' Company* (5) the question was as to the right of support of one house by another not immediately adjoining, on the ground of thirty years enjoyment of such support, and there *Bramwell*, B., made some observations which seem very relevant to the present inquiry. Supposing

(1) 7 H. L. C. 386. (3) 4 C. P. D. 177.
(2) 13 C. B. (N.S.) 841. (4) 11 Ch. D. 852.
(5) 4 H. & N. 602.

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such a right to exist "it must," said the learned Judge, "be either as a matter of absolute right, or as a matter of prescription, or under the *Prescription Act*, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must neither be *vi*, *precario*, nor *clam*, it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other, but it will be only a conjecture." . . . . "In fact it is impossible to say which house is being supported. It is true that in this case when the Defendant's house was removed the Plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If anyone had done so, it would have been but a matter of conjecture. Therefore, supposing that the Plaintiff for more than twenty years had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right;" . . . . consequently, "no title was gained under any of the different ways in which it has been surmised it might have been gained." On principle I conclude, therefore, that acquiescence does not apply to the right in question.

Another argument in favour of the acquisition of the right in question has been based upon an analogy with the operation of the *Statute of Limitations*. "It seems to me," said *Lush*, J. (1), "to be the necessary consequence of the *Limitation Act* that such an easement" (*i.e.*, an easement not within the *Prescription Act*), "should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence; that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded in view of the necessary effect of the *Limitation Act* upon such an easement as this."

To the extent of holding that, if the right is to be acquired at all by lapse of time, twenty years is a reasonable period to confer the right, I think that the analogy is sound; but beyond that it appears to me not to go. The *Statute of Limitations* presupposes a right of action and takes it away if not put in force for twenty years; that furnishes no reason for casting a new burden upon a man where he has no capacity to bring an action or to create a physical obstruction to the exercise of the alleged right. To take away a right of action, if not put in force within a reasonable time is one thing; to take away a man's right in his property because he does not bring an action which he cannot bring, seems to be quite another thing.

The authorities which establish this existence of the right in question afford no distinct statement of the principle upon which it reposes, but there are to be found in them references to the open character of the user, to the knowledge of the servient owner, and to the lapse of time, which seem to shew that some

(1) 3 Q. B. D. 94.

notion of acquiescence was in the minds of the learned Judges; but when I ask myself what difference it makes whether the user be open or secret to a man who cannot stop such user, what is the value of knowledge to a man who cannot act on it, and what is the effect of a lapse of time in the course of which nothing can be done, I find myself unable to answer these inquiries; and I think that the circumstances under which the building has been erected and the support enjoyed are immaterial. I regard the right as resting, not on any principle, but solely on a series of authorities which disclose no clear ground for their existence; but as it has been established that the right in question may be acquired by the lapse of time, I think that the period of twenty years may and ought to be held a sufficient one to confer the right.

The period of twenty years was that limited by the statute 21 James 1, c. 16, for bringing possessory actions and making entries; it was applied by the Judges to cases of prescription, so that before the *Prescription Act* the uninterrupted enjoyment of an easement for that length of time was constantly held to afford a ground for presuming the necessary grant or covenant; it has been referred to in *Stansell* v. *Jollard*, before *Ellenborough*, L., in 1803 (1), in *Dodd* v. *Holme* (2), and in others of the authorities relative to this very right as sufficient to confer it; and it may well be maintained as reasonable in itself. I therefore answer your Lordships' second question in the affirmative.

I have already shewn that I view the right in question as the result of an artificial rule of law, with which knowledge and acquiescence have nothing to do. I therefore answer your Lordships' third question by saying that in my opinion if the acts done by the Defendants would have caused no damage to the Plaintiff's building as it stood before the alterations made in 1849, it is not necessary to prove that the Defendants or their predecessors in title had knowledge or notice of those alterations, in order to make the damage done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong.

For the reasons already given, I submit (in answer to your Lordships' fifth question) my opinion that the course taken by the learned Judge at the trial of directing a verdict for the Plaintiffs was correct, according to the law of *England* as it now stands. His conclusion involves the proposition that, by the mere act of his neighbour and the lapse of time, a man may be deprived of the lawful use of his own land, a proposition which shocks my notions of justice, and against which I have struggled, but have struggled in vain; because, as I repeat with regret, I can find no reasonable proposition on which to rest the long line of decisions on the question before your Lordships. It would be presumptuous in me to inquire how far your Lordships will be bound by this long *catena* of authorities, or free to act on reason and principle, and I therefore humbly submit to your wisdom the conflict which appears to me to exist in this important case between the two governing principles of our laws.

BOWEN, J.:—My Lords, it appears to be established by an irresistible weight of authority than an ancient house is entitled to such support from the adjacent soil as it has immemorially enjoyed. The first question put to us by your Lord-

(1) 1 Selw. N. P. 10 Ed. 435, tit. Consequential Damages.
(2) 1 Ad. & E. 493.

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ships must, therefore, be answered in the affirmative. Before replying to the rest, I propose to state my view as to the nature of this right of support and the mode of its acquisition.

It has been urged upon your Lordships that the support from the adjoining land to which an ancient house is entitled is a natural right of property. In one aspect, but in one aspect only, it may be viewed as such, in so far namely as it arises out of the lawful use by a man of his own land. But in truth it also involves something beyond the natural use of a man's soil, viz., a collateral burden upon his neighbour, limiting, after a defined interval of time, the otherwise lawful use of the neighbour's own property. Under this aspect it is a right which cannot be natural, but must be acquired.

Nor is it necessary in order to account for its existence to invent the pretext of an imaginary positive law conferring the privilege as an exceptional boon on houses built before memory began. *Entia non sunt multiplicanda præter necessitatem.* A simpler explanation will suffice. That a right of support for buildings *may* have a lawful origin at any moment is clear, for it can be created by agreement made in due and binding form with an adjoining owner. All that the law, therefore, seems in the case of support for ancient buildings to do is to repeat the operation it performs so constantly in the case of other immemorial user. It assumes some possible lawful origin for the enjoyment, prior to the dawn of legal memory. So long as the Courts of Common Law were hampered by the barriers between law and equity, this doctrine was stated in a necessarily narrow way as if it were some "legal" origin that ought to be presumed. At the present day, when law and equity are fused, the proposition may with advantage be recast in a more liberal form, namely, that the law will presume any *lawful*, and not merely any *legal*, origin consistent with the circumstances of the case.

A binding and irrevocable concession on the part of some adjoining owner made in bygone days, or else an arrangement effected, expressly or by implication, upon the separation of one property into two parcels, is the source to which reason turns for the requisite lawful origin of all immemorial rights which either burden a neighbour's land or curtail his natural use of it. This is the theoretical beginning of prescriptive affirmative easements. To this initial source is ascribed the ancient window light: *Aldred's Case* (1). To a similar commencement by a parity of reason, and not without the sanction of authority, may be referred the right of an "ancient" house to its immemorial support: *Partridge* v. *Scott* (2); *Wyatt* v. *Harrison* (3); *Humphries* v. *Brogden* (4).

Your Lordships, however, in the present appeal have to consider the character and limits of a presumption in favour of the right of support for a modern building which has been held to arise after a much shorter period of user, viz., user for twenty years. Unquestionably, in the case of affirmative easements and of window lights, after twenty years user of a special kind, a presumption of right has been sanctioned by the Courts independently of and before the *Prescription Act.* I propose to examine its principle and nature, and, having done so, to consider whether a title by twenty years user in the case of support for buildings is

(1) 9 Co. Rep. 58.
(2) 3 M. & W. 228.
(3) 3 B. & A. 875.
(4) 12 Q. B. 749.

merely an illustration of the same rule applied to distinct subject-matter, or a rule based on any different grounds and accompanied with any other limitations.

First, then, as to affirmative easements and window lights. When enjoyment of a certain kind has existed from time immemorial, the law infers for it, as we have seen, any possible lawful origin. But user of a shorter period may well be surrounded with circumstances which will point, unless explained, to the conclusion that such user is only the enjoyment of a right. "This is founded," says *Wilmot*, C.J., speaking of the special case of window lights: *Lewis* v. *Price* (1); "*on the same reason* as when the lights have been immemorial; for this" (*i.e.*, the shorter period) "*is long enough* to induce a presumption that there was originally some agreement between the parties."

For a considerable period in the history of English law, there may probably have been no hard and fast line as to the length of user short of the date of legal memory which would be sufficient in the case of an alleged easement to authorize the inference of a right. It is at all events certain that the twenty years limit did not make its appearance in our law till a comparatively recent date. In the reign of Queen *Elizabeth*, when *Pope* v. *Bury* (2) was decided, it had not been introduced so far as window lights were concerned, nor is there any trace of its existence up to this time in the case of any easement affirmative or negative. But in the year 1623 the statute of 21 Jac. 1, c. 16, was passed, by which entry into lands was prohibited, except within twenty years after the accruer of the right, and, as a necessary corollary, an adverse enjoyment of lands for twenty years became a bar to any action of ejectment. Easements were not and could not be treated as within the statute; but the idea of twenty years was apparently borrowed by the Courts as a *quasi* parliamentary standard, for the use of Judges and juries, by which to mete out a reasonable measure of time. In the case of affirmative easements the twenty years rule obviously thus began (2 *Wms. Saunders*, 175). It was in the same manner that the twenty years rule was applied by very slow degrees to window lights: *Lewis* v. *Price*; *Dougal* v. *Wilson*; *Darwin* v. *Upton*, *per Buller*, J. (3). It was not a positive proprietary law, for the rule at the date of *Bury* v. *Pope* (2) was not a part of the common law, and the Judges have no power to engraft new laws on old. In truth it was nothing but a canon of evidence. In *Read* v. *Brookman* (4) *Buller*, J., speaks of it "as a rule which has been laid down respecting the length of time which shall be sufficient to raise a presumption."

Similar specimens of judge-made rules of proof are to be found in other passages of the law of evidence. If seven years elapse after a traveller has crossed the four seas without his being heard of, the presumption of the continuance of his life ceases and a counter-presumption arises that he is dead. This seven years rule has been said to be adopted by the Courts in analogy to the statute 19 Car. 2, c. 6, with respect to leases dependent upon lives, and 1 Jac. 1, c. 11, with respect to bigamy. Traces, on the other hand, of some such limitation appear earlier than these statutes in the books; but whether the judge-made rule upon the subject of the continuance of life be imitated or not from the statutes of the realm, it is at best a mere maxim of evidence recommending an inference

(1) 2 Wms. Saund. 175.
(2) Cro. Eliz. 118.
(3) 2 Wms. Saund. 175a.
(4) 3 T. R. 159.

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which it is for the jury to find and which may be rebutted. The original presumption that after twenty years a bond had been satisfied by payment, was in like manner a rule of evidence, first introduced, it is said, by Lord *Hale*, and accepted slowly and reluctantly by the Courts: *Oswald* v. *Legh* (1). The presumption that after thirty years a document produced from the proper custody has been duly executed is another instance of such rules. In all these, the inference of which the Courts approve must be drawn, not by the Court, but by the jury; in none of these is the inference conclusive.

The form in which the presumption built upon a twenty years' enjoyment has usually been framed is that of a lost grant or covenant, according as the right claimed is to an affirmative or a negative easement. At the time when the twenty years rule was first promulgated by the Courts, a document under seal was the only specific mode known to the common law in which an incorporeal hereditament could be created. But there are many cases in which equitable rights in the nature of an easement arise without any deed at all. There may be a binding agreement for valuable consideration not under seal. There may be stipulations which would not otherwise run against the land, but which will bind a purchaser with notice. Or there may be conduct or inaction on the part of an adjoining owner which will in equity preclude him from denying that a right in the nature of an easement has been acquired against himself. Any of these suppositions under appropriate circumstances may conceivably furnish a lawful origin of which Courts of Law, released in these later times from the narrow confines of a limited jurisdiction, may properly take cognizance. Even at a time when a deed was the only origin for an easement known to the common law, language is found in the judgments of the Law Courts suggestive of the notion that this lost deed was merely the specific form in which the lawful origin had taken shape.

It is further to be noted that the exact inference recommended by the law was not, in the case of affirmative easements, that the consent of the adjoining owner had been first given during the twenty years user, but that some lawful origin preceded the earliest act of enjoyment. The lost grant was in theory anterior to the user; it was not the shape in which the submission of the servient owner was supposed during the twenty years to mould itself: *Doe* v. *Reed* (2); *Moore* v. *Rawson* (3). In this sense it is inaccurate to speak of such rights as arising from the twenty years acquiescence of the servient owner. His acquiescence for twenty years, in the case of affirmative easements, was evidence that the right had existed previously.

It appears to be manifest, in spite of some inexact expressions of earlier Judges, that this presumption of a lost grant or covenant was nothing more than a rebuttable presumption of fact. This view is supported by a chain of authorities, the earliest of which are collected in 2 *Wms. Saunders*, 175A, and all of which have been examined and discussed in the judgments of *Cockburn*, L.C.J., and *Brett* and *Thesiger*, L.JJ. It must at the same time be conceded that the Courts exhibited a disinclination to treat the presumption as an ordinary one. They preferred to leave it in a logical cloud, and juries were encouraged, for the sake of

(1) 1 T. R. 270. (2) 5 B. & Ald. 232.
(3) 3 B. & C. 339.

quieting possession, to infer the existence of deeds in whose existence nobody did believe: *Eldridge* v. *Knott* (1). Some metaphysical industry indeed has been expended with the view of explaining how a presumption of fact might yet be hedged round with an artificial authority and prestige which would allow it to be treated as something more than a mere presumption of fact. Thus it has been argued that the imaginary deed was legal machinery only, the only question being, as was said, whether the legal consequences really incident to a valid grant were well annexed to the state of facts disclosed by the twenty years user: *Starkie* (2). The embarrassment of the Courts and of the profession appears, from the judgment of *Parke*, B., delivered shortly after the passing of the *Prescription Act*, in *Bright* v. *Walker* (3), and from the report of the Real Property Commissioners which preceded the passing of that statute.

But it seems a contradiction in terms to maintain that this rebuttable presumption of the existence of a grant would not at any time have been necessarily counteracted by actual proof that no such grant ever had been made. No case, it is true, occurs in which the presumption is recorded as having been displaced in this manner at Nisi Prius, though proof that no such deed could be efficacious in law was acknowledged to put an end to the presumption. But the reasoning of *Brett*, L.J., in the Court of Appeal in this case, seems to me to shew what would, before the recent fusion of law and equity, have been the necessary result of positive disproof of the supposed deed, though I think, with deference, that he overlooks the altered condition of the problem due to the modern recognition in Courts of Law of equitable rights. And with regard to the law as it formerly existed, the fact that the presumption, in the reign of Queen *Elizabeth*, was unknown, proves, I submit, to demonstration, that it is at most an artificial canon of evidence and nothing more. In *Darwin* v. *Upton* (4), *Gould*, J., explains its nature by the illustration of a demand and refusal which, in an action in trover, are evidence of a conversion, but not the conversion itself. It has always been the law that this evidence of conversion is for the jury, and that if a jury find simply a demand and refusal, the Courts have no power as a matter of law to infer a conversion: *Vaughan* v. *Watt* (5); *Chancellor of Oxford's Case* (6); *Starkie* (7).

The question, so far as lost grants and lost covenants are involved, seems to me to have lost much of its practical importance, owing to recent changes in the law. It would not now be sufficient to disprove a legal origin, unless the possibility of an equitable origin were negatived as well.

Such is the history and character of the twenty years rule as applied to affirmative easements, and further to the negative easement of the window light. Is there any valid reason to doubt that such also is its history and explanation as applied to the claim of support for modern buildings? The presumption raised in cases of support to buildings by the shorter user of twenty years, is modelled upon the presumption growing out of immemorial enjoyment. The one presumption is the echo at a distance of the other. The distinction is, that the shorter

(1) 1 Cowp. 215.
(2) 3 Stark. Ev. 928, Ed. 1842.
(3) 1 C. M. & R. 221.
(4) 2 Wms. Saund. 175a.
(5) 6 M. & W. 492.
(6) 10 Co. Rep. 57.
(7) 3 Stark. Ev. 1160, Ed. 1842.

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period gives rise to a rebuttable, the longer to an irresistible inference. What necessity is there for inventing the hypothesis of some positive law in virtue of which in some special way a house after twenty years user is to be clothed with an absolute right to support as if it were an ancient house? The objection to this theory always is the same. Such a positive law apparently did not exist prior to the Statute of *James*. Judges have had no power to create it since.

There are unquestionably certain broad differences between affirmative easements and the negative easement of a window light. There are differences between the window light and the right of a modern house to support from the adjoining soil. In the first place, it is true that the window light, unlike a right of way, does not begin in acts of enjoyment which are *primâ facie* an encroachment upon the neighbour's soil. "It is acquired," says *Littledale*, J., in *Moore Rawson* (1), "by occupancy." It is acquired, that is to say, by occupancy upon one's own soil as distinct from user upon another's and without any *necessity*, therefore, to assume that the occupancy is *preceded* by a grant. But a consensual origin at one time or another, in the case of a title to window lights, the law still implies: *Lewis* v. *Price* (2); *Cross* v. *Lewis* (3).

The right to support for buildings from the neighbouring land is more allied in some ways than the window light to the class of affirmative easements. The man who uses his neighbour's soil for the support of his house affects his neighbour's land more tangibly than the man who opens a window to overlook it. In the instance of the building which is supported we have a direct lateral pressure upon the adjoining soil. There is certainly no case which decides that this pressure gives rise to a right of action on the neighbour's part, and practical reasons of convenience may be adduced against such a surmise, although it might perhaps be argued that an action ought on principle to lie against, and an injunction be obtainable to restrain, the man who is actually availing himself of his neighbour's soil and using it in a manner which in twenty years will be evidence of the acquisition of a right so to do. But assuming from the silence of the books that no right of action is created by the adverse enjoyment of support for buildings, the right to support may none the less be a negative easement like light, and capable of a similar origin. It is on the theory of agreement made at some time or another between the neighbours that the right to support is based in the case of an ancient house. Borrowing the argument used as to lights by *Wilmot*, C.J., we may say that the twenty years rule is "founded on the same reason" as the immemorial title.

If, however, authority be needed in support of reason for the view that the neighbour's presumed consent is the foundation of the modern as well as the ancient title to support for buildings, it will be found in the language of the Courts in various cases: *Partridge* v. *Scott* (4); *Humphries* v. *Brogden* (5); *Bonomi* v. *Backhouse* (6).

Nor can I admit that any reason exists why in the case of support to buildings the same doctrines should not regulate the quality and nature of the user required as apply to the mode of acquisition of affirmative easements and of light.

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(1) 3 B. & C. 332.
(2) 2 Wms. Saund. 175.
(3) 2 B. & C. 689.
(4) 3 M. & W. 228.
(5) 12 Q. B. 739.
(6) E. B. & E. 646, 654.

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Some conditions there surely must be determining the character of the enjoyment. If it be otherwise, the case of support to buildings so far from being analogous to the case of lights, as Lord *Ellenborough* and others have called it, is an anomaly without parallel in English law. For mere possession is, as a rule, inadequate to create by lapse of time an adverse right which is to limit a neighbour's enjoyment of his property. "Mere lapse of time," says *Dallas*, C.J., in *Gray* v. *Bond* (1), "will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Such too was the principle of the Roman law. The cantilena *nec clam, nec vi, nec precario* is a doctrine not peculiar to affirmative easements, though we are chiefly familiar with it in that chapter of the law of *England*. It seems in truth a natural condition of any inchoate user which is to mature by length of time and apart from statute into the presumption of a right acquired at a neighbour's expense. Whatever may be the peculiarities of the right of support to buildings as contrasted with ordinary easements, and I admit that such exist, why should the generic maxim *nec vi, nec clam, nec precario* be discarded as inappropriate when we come to deal with support to buildings?

It is no doubt urged that the right to such support differs from all other acquired rights in this, that the enjoyment of support by a building cannot be reasonably interrupted. This cannot be true always, even if it is true at times. There may be circumstances in which any interruption of the modern building's support would be attended with great expense and even danger to the property of the servient owner. But is there any distinction in this respect between the window light and the right of support except what may be called a distinction of degree? In some instances it is easy to interrupt the enjoyment of both. In some it will be difficult to interfere with either. Circumstances may be conceived in which it would be as serious an enterprise to block out a light as to withdraw the support of the house. Yet there can scarcely be an instance in the case of either in which the interruption would not be physically possible if it were worth the necessary trouble and expense. The difficulty of interrupting percolating water is of a wholly different kind, and far more insurmountable. But admitting that physical possibility or impossibility of interruption may not be the test, and that no right of support ought to arise by lapse of time where interruption is not practically feasible it follows, *not* that a right of support for buildings can never be acquired as ordinary easements are, but merely that a right of support for buildings cannot always and under all circumstances be acquired. In like manner our law has distinguished between that access of air, light, and wind which is definite and can be interrupted, and that access of air light, and wind which is indefinite, incapable of interruption, and which accordingly never grows into a right.

If, indeed, the law recognised no such thing as the right of support to buildings as it recognises no rights to the access of percolating subterranean water there might be good grounds for saying that the possibilities of interrupting a building's support were possibilities of which the law took no account; but the contrary is the case. The law of *England* treats the right of support for buildings as a

(1) 2 B. & B. 671.

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right perfectly susceptible of acquisition, and it does so, I conceive, upon the very ground that the enjoyment can usually as a fact be interrupted, even though interruption may be very inconvenient. "Although," says Lord *Campbell* in *Humphries* v. *Brogden* (1), "there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man, *and acquiesced in by another who has the power to interrupt them*; and as on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle." This is a considered judgment of Lord *Campbell* and *Patteson*, *Coleridge*, and *Erle*, JJ. They distinctly refer the right of support for the modern building to the hypothesis of a modern covenant, and do so on the express ground that the adjoining owner can in fact interrupt the user, expensive or inconvenient as the interruption may be. To assume, indeed, that interruption in such cases is out of the question, and that a right nevertheless is gained by user, would be to make the right of support for buildings a right at variance with all the principles of English law. Nor would the difficulty be avoided by calling it a law of property. This would be only creating for its benefit a new class in the category of rights of which it will be a solitary member. To say, on the other hand, that the Courts have created such a doctrine without rhyme or reason, is to do scant justice to the great authority of the Common Law Courts of past ages. Surely it is simpler to believe that the law deals with support to buildings as with light, considers it an enjoyment capable on the whole of interruption, and capable therefore of ripening into a right where interruption does not occur. It might, perhaps, be added with some show of reason that the user ought, if the analogy of lights and other easements were to be followed, to be neither violent nor contentious. The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakeable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: *Eaton* v. *Swansea Waterworks Company* (2).

I am aware that this view is not one that has been laid down in any decided case. On the contrary, it has been said that in the case of window lights, the only manner in which enjoyment could be defeated before the Prescription Act was by physical obstruction of the light. But for the language of some of the Judges, one might well hesitate with Lord *Wensleydale*, in *Chasemore* v. *Richards* (3), in accepting this statement of the law as reasonable. Such was not the doctrine of the civil law, nor the interpretation which it placed upon the term "*non vi*"; but the difficulty at any rate is not greater with respect to the right of support than that which might easily, up to the passing of the Prescription Act, have occurred in the analogous case of a window. If in any particular instance interruption is impracticable, and if perpetual protests in such instances are also legally useless, there is no necessity that I know of in law or in sense to

(1) 12 Q. B. at p. 749.
(2) 17 Q. B. 267.
(3) 7 H. L. C. 386.

assert that any right will in that special instance be the consequence of non-interruption. I am not, however, aware that in the case of *Angus* v. *Dalton*, which is now before your Lordships, it ever was or could be suggested that the enjoyment of support was in any degree incapable of interruption.

Finally, why should not the condition be recognised in cases of support for buildings which prescribes that the user must be open? In the negative easement of the window light the condition is no doubt almost necessarily fulfilled. The adjoining owner, if he is a person capable in law of being affected by adverse user, has notice either by himself or his agents of the construction of the window. Probably with respect to support the character of the building and the nature of the soil often afford an equal notice to the adjoining owner of the enjoyment, out of which a right is developing; but I do not regard actual notice to the adjoining owner as the crucial point: *Cross* v. *Lewis* (1). The publicity or openness of the enjoyment seems to me the real test. Without this publicity the quality of the user cannot be such as is uniformly required to raise the inference of an acquired right. If there be peculiarities in the construction of the building which render the enjoyment secret, the user is not strictly adverse. It is said that it would be an idle ceremony to acquaint a neighbour with the fact of an user which he cannot reasonably prevent. I have already stated what seems to me to be the real value of the argument drawn from the supposed difficulties of interruption. It must not, however, be forgotten that the real question is what is the quality of the user? Has it been an enjoyment in the face of day which reasonable neighbours might see and understand? If so, the presumption arises that it is of right, whether such right has been conceded during the twenty years user or at any previous time.

It has been asked whether a man, whenever he increases the internal weight of portions of his house, is bound to give notice to his neighbours. But if, by the increased weight, he is seeking to acquire additional rights against the neighbour, the analogy of all law would appear to demand that his enjoyment should be open. There is no abstract difficulty in leaving it to the jury to say whether the conditions of publicity have in fact been fulfilled. Your Lordships have been told indeed in argument at the Bar that to submit such questions to the jury would be to render titles of adjacent owners insecure and dependent on matters of much nicety. The danger would not be so great as is assumed, for in most of such cases a right to some support will *ex hypothesi* have been acquired, and adjoining owners will not be able easily to do wanton mischief. Nevertheless, the suggested danger, if it exists at all, ought not to be overlooked. But it can readily be cured by legislation. All that is needed is to bring into the existing Prescription Act the omitted case, if omitted it really has been, of a claim to support for buildings, and to deal with it as window lights have been dealt with.

If the user complies with the necessary conditions, the presumption, after twenty years, of some lawful origin will arise. A case thus *primâ facie* established may be met in two ways. The Defendant may disprove the user or its quality; or in the last resort he may, if he can, while admitting the user attempt to answer the presumption of some lawful origin, a task which he will find diffi-

(1) 2 B. & C. 686.

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cult in practice, inasmuch as mere proof of the absence of any covenant under seal, for the reason I have above indicated, will not any longer, since the fusion of law and equity, cover the necessary ground.

The above, I submit, is a fair account of the law as regards the claim to support for a modern house, and of the application to such a claim of the twenty years rule. The adaptation of the twenty years rule to the case of support to buildings has no doubt been slow. It has been accepted gradually and with hesitation, a fact which of itself bears testimony to the soundness of the view that it is no part of the positive law of property. Its application to the case of lights was equally gradual, for the rule as to lights had not become stereotyped up to the beginning of the reign of *George* III. (*See Lewis* v. *Price* (1)). The twenty years rule as to the presumed satisfaction of bonds also grew into force by slow degrees. But I think that there is an ample weight of authority to shew that in cases of support to buildings, such a rule now at last prevails, and that it can be applied in substantial accordance with the general principles of the law of easements. Yet even if the case of support for buildings differs materially from all easements affirmative or negative, if it stands alone by itself as a separate species of pseudo easement, can it on the other hand be doubted that the twenty years rule as found in connection with it is really the same presumptive rule which governs easements in general, and that it is the doctrine applicable to the acquisition of easements which the law of *England* has chosen to adapt to the special, and in some ways the anomalous case of support to a modern building.

Against the above view has been placed the language of Lord *Wensleydale* and Lord *Cranworth* in the case of *Backhouse* v. *Bonomi*. "I think it perfectly clear," says Lord *Wensleydale* (2), "that the right in this case was not in the nature of an easement, but that the right was to an enjoyment of his own property, and that the obligation was cast on the owner of the neighbouring property not to interrupt that enjoyment."

I have already considered to what extent and in what sense the right to support for buildings is a right to use a man's own property; to what extent it also involves a collateral title to impede the neighbour in the natural use of the neighbour's own. It is to this important distinction between the case of support to houses and the case of an ordinary affirmative easement that Lord *Wensleydale* and Lord *Cranworth* appear to me to be referring, and a similar criticism applies to like expressions which at times have fallen from other Judges. *Backhouse* v. *Bonomi* (2) was in any event a case which proceeded on the basis of the existence in that special instance of the full right under discussion. The arbitrator had found all and every lawful origin which in law could create it. Whether the right when created arose from the presumption of a grant or from some imaginary law of property was not therefore necessarily in question.

In *Stansell* v. *Jollard* (3) the character of the user does not seem to have been disputed nor the presumption challenged. Lord *Ellenborough* indeed places the origin of support and lights on the same footing. He merely held that "Where, as in the case before the Court, a man had built to the extremity of his soil, and had enjoyed his buildin above twenty years, by analogy to the case of lights, he

(1) 2 Wms. Saund. 175a. (2) 9 H. L. C. 503.
(3) 1 Selw. N. P. 11th ed. 457.

had acquired a right to support." If the right of support is indeed analogous to the right to a window light, then the law would seem to be such as I have argued that it is.

Nor in *Hide* v. *Thornborough* (1) did any question apparently occur as to the quality of the user, nor was any attempt made to disprove the presumption. Here, again, the right was taken as having arisen, if it was a right acknowledged by the law. "If," said *Parke*, B., "there was twenty years enjoyment by the Plaintiff of the support of his house from the neighbour's land, and *it was known* that the Defendant's land supported the Plaintiff's house, that is sufficient to give him a right of support." This is but recognising the proposition that the user must be open. In *Partridge* v. *Scott* (2), the right is ascribed to the idea of a grant which ought not, at common law, says *Alderson*, B., to be inferred from any lapse of time short of twenty years after the Defendants might have been or were fully aware of the facts. I abstain from reviewing at length the other cases which bear on this point, as they have been abundantly examined by *Thesiger*, L.J., in the Court of Appeal below.

I now proceed to apply the above reasoning to the questions put by your Lordships.

1. This question I have already answered in the affirmative.

2. The period during which the house had stood was sufficient to give the Plaintiff the same right as if his house was ancient, provided the enjoyment fulfilled the conditions I have described, and provided it was not shewn by the Defendant that the right had no lawful origin.

3. It was necessary to prove that the Plaintiff had openly enjoyed the additional support rendered necessary by his alterations. It would of course be an open enjoyment if the Defendants or their predecessors in title had express knowledge or notice of the alterations and of their character. But the enjoyment of the additional support would also be open if the appearance of the altered building was such as to afford a reasonable indication to the adjoining owner of the alterations that had taken place. Except to this extent it was not necessary in my opinion to prove either knowledge or notice to the adjoining owner.

4. If the alterations were openly enjoyed, I do not think it would be necessary also to prove knowledge of the effect of the alterations.

5. The course taken by the learned Judge seems to me to have been wrong. It should, I submit, have been left to the jury to find whether the enjoyment was in fact open. I may add that I consider this would be the correct ruling at Nisi Prius, whether the right acquired after twenty years user be a right of property or a right acquired as I have described, for I do not regard the doctrine *nec vi*, *nec clam*, *nec precario* as necessarily peculiar to the law of affirmative easements. The law as to the quality of the user required to raise the presumption, and as to the rebuttable character of the presumption when raised should, I submit, be laid down as I have indicated. The exact forms of the questions for the jury would depend on the issues arising out of the Defendants' case. I think that the learned Judge was premature in assuming that no issues under the circumstances were likely to arise. One already had arisen upon the admitted facts, viz., whether the user was open or the reverse.

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(1) 2 C. & K. 260. (2) 3 M. & W. 220.

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The House took time to consider.

1881. June 14. LORD COLERIDGE:—

My Lords, in this case I have had the great advantage of reading the printed judgments prepared by my noble and learned friend the Lord Chancellor, and by my noble and learned friend opposite (Lord *Blackburn*). I had prepared a judgment of my own, but I have found that it would add nothing to what is about to be said, and much better said, by my noble and learned friends. I therefore content myself with saying that I entirely concur in the conclusions at which they have arrived, and in the reasons which they have given for them. I have to thank my noble and learned friend on the woolsack for allowing me to say this at once, as I have to be elsewhere.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, your Lordships are much indebted to the learned Judges by whom you have been assisted in this case for their careful and valuable opinions, in which the authorities have been fully examined. I do not myself propose to refer to those authorities, except so far as they seem to me to bear upon principles which have been brought into controversy, and as to which the learned Judges (even when they concur as to the practical result) are not agreed.

The questions upon these appeals may be reduced, shortly, to two:—The first, whether a right to lateral support from adjoining land can be acquired by twenty-seven years' uninterrupted enjoyment for a building proved to have been newly erected at the commencement of that time; the second, whether (if so) there was anything in the circumstances of this case, as appearing in the evidence, sufficient either to disprove the acquisition of such a right, or to make it dependent upon some question of fact, which ought to have been submitted to the jury.

There was another point, made by both the petitions of appeal, which I only mention, lest it should appear to have been overlooked. The action was brought by reason of the falling of the Plaintiffs' house through the excavation of the adjoining land of the Commissioners, in the course of certain works executed for

them by the Appellant *Dalton*, under a contract, and for *Dalton* by sub-contractors. The Commissioners disputed their liability for the acts of *Dalton*, and *Dalton* disputed his liability for the acts of his sub-contractors. The same point arose, under very similar circumstances, in *Bower* v. *Peate* (1), and was decided adversely to the contention of the Appellants. It follows from that decision (as to the correctness of which I agree with both the Courts below) that, if the Plaintiffs are entitled to recover at all, they are entitled to recover against both the Commissioners and *Dalton*.

I proceed to consider the principal questions in the case.

In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the *status quo* of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contigous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, *sine quo res ipsa haberi non debet*. All existing divisions of property in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo, ut alienum non lædas*. This is all that I understand to be meant by those passages of the judgments in *Humphries* v. *Brogden* (2), *Rowbotham* v. *Wilson* (3), *Bonomi* v. *Backhouse* (4), and *Backhouse* v. *Bonomi* (5), to which some of the learned Judges who assisted your Lordships have referred.

In these cases, or in some of them, there were buildings upon the land; but no separate question was raised as to the support necessary for the buildings, as distinguished from that necessary for the land; and the doctrine laid down must, in my opinion, be

(1) 1 Q. B. D. 321.
(2) 12 Q. B. 744.
(3) 8 E. & B. 142, 146, 151.
(4) 1 E. B. & E. 639, 642, 644.
(5) 9 H. L. C. 512, 513.

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understood of land without reference to buildings. Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it. This distinction (and, at the same time, its proper limit) was pointed out by *Willes*, J., in *Bonomi* v. *Backhouse* (1), where he said, "The right to support of land and the right to support of buildings stand upon different footings, *as to the mode of acquiring them*, the former being *primâ facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant (see *Caledonian Railway Company* v. *Sprot* (2)): whilst the latter must be founded upon prescription or grant, express or implied; *but the character of the rights, when acquired, is in each case the same.*" Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property, in precisely the same way as when he has granted a right of support to buildings. The right, therefore, in my opinion, is properly called an easement, as it was by Lord *Campbell* in *Humphries* v. *Brogden* (3); though when the land is in its natural state the easement is natural and not conventional. The same distinction exists as to rights in respect of running water, the easement of the riparian landowner is natural; that of the mill-owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional, *i.e.*, it must be established by prescription or grant.

If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated use of the land would

(1) 1 E. B. & E. 655. (2) 2 Macq. 449.
(3) 12 Q. B. 742.

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require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural. If a building is divided into floors or "flats," separately owned (an illustration which occurs in many of the authorities), the owner of each upper floor or "flat" is entitled, upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself: *Caledonian Railway Company* v. *Sprot* (1).

I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with *Lindley*, J., and *Bowen*, J., that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land, or building, to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which, by the servient tenement, is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight.

Lord *Campbell*, in *Humphries* v. *Brogden* (2), referred to the servitude *oneris ferendi* (applied in the law of *Scotland* to a house divided into "flats" belonging to different owners), as apt to illustrate the general law of vertical support. The servitude so denominated (*ut vicinus onera vicini sustineat*) in the Roman law was exclusively "urban," that is, relative to buildings, whether in town or country; and the instances of it given in the Digest refer

(1) 2 Macq. 449. (2) 12 Q. B. 756.

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to rights of support acquired by one proprietor for his building, or part of it, upon walls belonging to an adjoining proprietor: Inst. lib. 2, tit. 3; Dig. lib. 8, tit. 2, sects. 24, 25, 33; also tit. 5, sects. 6, 8. But, in principle, the nature of such a servitude must be the same, whether it is claimed against a building on which another structure may wholly or partly rest, or against land from which lateral or vertical support is necessary for the safety and stability of that structure.

These principles go far, in my opinion, to establish, as a necessary consequence, that such a right of support may be gained by prescription. Some of the learned Judges appear to think otherwise, and to doubt whether it could be the subject of grant. For that doubt I am unable to perceive any sufficient foundation. *Littledale*, J., in *Moore* v. *Rawson* (1), spoke of the right to *light* as being properly the subject, not of grant, but of covenant. If he had said (which he did not), that a right to light could not be granted, in the sense of the word "grant" necessary for prescription, I should have doubted the correctness of the opinion, notwithstanding the great learning of that eminent Judge. Although the general access of light from the heavens to the earth is indefinite, the light which enters a building by particular apertures does and must pass over the adjoining land in a course which, though not visibly defined, is really certain, and, in that sense, definite. Why should it be impossible for the owner of the adjoining land to grant a right of unobstructed passage over it for that light in that course? The term "ancient" light seems to me itself to imply that such a right might be acquired by prescription. But, however this may be, the opinion of *Littledale*, J., is stated by him in words which (unless I misunderstand the true nature of support) do not apply to that easement. "A right of common" (he says) "or a right of way, being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant; yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant, which the law would imply, not to interrupt the free use of the light and

(1) 3 B. & C. 340.

air." The pressure of the dominant tenement, in the case of support, is *upon* the soil of another man's land, and I can see no material difference between this and "something positive done or used *in* the soil of another man's land." *Willes*, J., in *Bonomi* v. *Backhouse* (1), when delivering the unanimous judgment of the Court of Exchequer Chamber, said that "the right to support of buildings" not only might, but "*must* be founded upon prescription or grant, express or implied." *Bramwell*, B., in *Rowbotham* v. *Wilson* (2), said, "I am of opinion that it is competent to the owner of land, on or after the severance of the mines, to grant to the grantee of the mines the right to damage the surface. I cannot see how, if there may be a grant of mines, and of the right to enter, sink shafts, and work, there may not be such a grant as that contended for here" (*i. e.*, the right to *take away* support from the surface). "Nor can I see how, if *a grant* of the right of unobstructed light and air, or *of support of the soil*, to an adjoining owner, would be good, a grant of such a right as claimed here would not be. My Brother *Hayes* said, presumed grants of windows and of support were idle fictions which ought never to have been invented; perhaps so, but the fact that they were shews that the inventors and everybody else supposed that *real grants of such a nature would be* good." The rule as to prescription is thus stated in Sir *Francis North's* argument in *Potter* v. *North* (3): "The law allows prescriptions but in supply of the loss of a grant. Ancient grants happen to be lost many times, and it would be hard that no title could be made to things that lie in grant but by shewing of a grant; therefore, upon usage *temps dont*, &c., the law presumes a grant and a lawful beginning, and allows such usage for a good title; but still it is but in supply of the loss of a grant; and, therefore, for such things *as can have no lawful beginning*, nor be created at this day *by any manner of grant, or reservation, or deed that can be supposed*, no prescription is good." *Ashhurst*, J., in *Lord Pelham* v. *Pickersgill* (4), laid it down as the general rule, that "every prescription is good, if by any possibility it can be supposed to have had a legal commencement." Be the theory what it may, its true foundation, in point of fact, is that which the Romans called

(1) 1 E. B. & E. 635. 5 Jur. N.S. 1345
(2) 8 E. & B. 147. 3 Jur. N.S. 1297
(3) 1 Vent. 387.
(4) 1 T. R. 667.

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"*usucapio*," under the conditions defined by Sir *Edward Coke*. "Both to customs and prescriptions, these two things are incidents inseparable, viz., possession or usage, and time. Possession must have three qualities, it must be long, continual, and peaceable, for it is said, *transferuntur dominia, sine titulo et traditione, per usucapionem, scilicet per longam, continuam, et pacificam possessionem. Longa, i.e., per spatium temporis per legem definitum. . . . Continuam, dico, ita quod non sit legitime interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. . . . Longus usus, nec per vim, nec clam, nec precario*" (1). (The Latin is from *Bracton*). All these conditions are capable, in my judgment, of being fulfilled as to the right of support to buildings, and, when they are fulfilled, I am unable to understand why the right should not be held to be prescriptively established.

The policy and purpose of the law on which both prescription and the presumptions which have supplied its place, when length of possession has been less than immemorial, rest, would be defeated, or rendered very insecure, if exceptions to it were admitted on such grounds as that a particular servitude (capable of a lawful origin) is negative rather than positive; or that the inchoate enjoyment of it before it has matured into a right is not an actionable wrong; or that resistance to or interruption of it may not be *conveniently* practicable. I assume, for the present purpose, that a man who places on his own land, where it adjoins that of his neighbour, a weight which increases its pressure upon his neighbour's land, is not thereby guilty of an actionable wrong. If this be so, the reason probably is, that the act is lawfully done upon his own land, and that the owner of the adjoining land suffers no actual or appreciable damage from the increased amount of pressure which it has to bear, except so far as the continuance of that pressure, if uninterrupted, may tend to ripen into a right, and so to enlarge the servitude to which this land was previously subject. But against this he has his own remedy, if he chooses to prevent and interrupt it. That power of resistance by interruption does and must in all such cases exist, otherwise no question like the present could arise. It is true that in

(1) 1 Co. Lit. 113 b, 114 a.

some cases (of which the present is an example) a man acting with a reasonable regard to his own interest would never exercise it for the mere purpose of preventing his neighbour from enlarging or extending such a servitude. But, on the other hand, it would not be reasonably consistent with the policy of the law in favour of possessory titles, that they should depend, in each particular case, upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them. They can always be interrupted (and that without difficulty or inconvenience), when a man wishes, and finds it for his interest, to make such a use of his own land as will have that effect. So long as it does not suit his purpose or his interest to do this, the law which allows a servitude to be established or enlarged by long and open enjoyment, against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable, and more consistent with public convenience and natural equity, than one which would enable him, at any distance of time (whenever his views of his own interest may have undergone a change), to destroy the fruits of his neighbour's diligence, industry, and expenditure.

The law of ancient lights, as it stood before the *Prescription Act*, was a stronger example of the application of these principles; the easement in that case being more purely negative. I cannot agree with those who think that law too exceptional and anomalous to furnish an analogy, or exemplify a principle, applicable to any other case. The servitude *non altius tollendi, ne luminibus officiatur*, was as well known to the Roman jurisprudence as the servitude *oneris ferendi*, or any other; and, if natural and not only technical reasons are to be regarded, it is difficult to conceive anything more needful for the comfort of life and enjoyment of house property than the unobstructed enjoyment of light. There is no actionable wrong done by opening new lights which overlook a neighbour's land; and to obstruct them, by building or erecting hoardings on that land, when there is no other motive for doing so than to prevent them from ripening into an easement, is as seldom likely to be conveniently practicable as the obstruction of the vertical or lateral support of buildings by excavation or otherwise. But these have not been regarded as sufficient reasons

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why the right to light should not be gained by an enjoyment and user for more than twenty years.

From the view which I take of the nature of the right of support, that it is an easement, not purely negative, capable of being granted, and also capable of being interrupted, it seems to me to follow that it must be within the 2nd section of the *Prescription Act* (2 & 3 Will. 4, c. 71), unless that section is confined (as *Erle*, C.J., in *Webb* v. *Bird* (1), appears to have thought) to rights of way and rights of water. The opinion to that effect expressed by that eminent Judge, was not necessary for the decision of *Webb* v. *Bird* (1), nor can I perceive that any concurrence in it was expressed by *Willes*, J., and *Byles*, J., who agreed in the decision. The point then determined (as I understand it) was, that a claim to have free access for all the winds of heaven to the sails of a windmill was too large and indefinite in its nature to be acquired by use or to be capable of interruption, within the meaning of the 2nd section of the *Prescription Act*. That determination I assume to have been correct. But I do not think it possible, without a degree of violence to the express terms of the Act, for which neither its context nor its policy (as expressed in the preamble) affords any justification, to restrict the operation of the 2nd section to "the two descriptions of easement therein specified, viz., the right to a way or watercourse." The expressed policy of the Act is large and general; it is to prevent claims of prescription from being defeated by shewing a commencement within time of legal memory. Why should not this extend to other easements besides ways and water rights, and lights, which (by the 3rd section) are specially provided for, and exceptionally favoured? In terms the 2nd section extends to every claim which could be "lawfully made at the common law by custom, prescription, or grant, to any way, or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water." The interjection of the words, "or other easement," between ways and watercourses may seem singular, but I cannot think that they ought therefore to be reduced to silence, or arbitrarily limited. If any explanation of the place in which they occur is necessary, it may, I think,

(1) 10 C. B. (N.S.) 282.

be found in the separate mention, which follows, of "land" and "water." *Reddendo singula singulis*, the words (as it seems to me) may be read thus, "Any way or other easement to be enjoyed or derived upon, over, or from any land, or any watercourse, or use of water to be enjoyed or derived upon, over, or from any water." So reading them, they would include (unless there is something else in the statute to exclude it, and I find nothing) the easement of support.

I am not insensible to the probability that there may be some error in an opinion which seems to be opposed to that of all the learned Judges in both the Courts below, and of most of those by whom your Lordships have been assisted on this occasion. They did not all advert to the *Prescription Act*, but, of those who did, *Lindley*, J., was, I think, the only one who expressed any doubt. The opinions of those learned Judges may possibly have been, in some degree, influenced by what was said by so distinguished a Judge as *Erle*, C.J., in the case of *Webb* v. *Bird* (1), which was cited for this purpose by *Lush*, J. To those who considered that the right of support was not an easement, or that it was of so purely negative a character as to be incapable of being granted, or of being interrupted, within the meaning of the statute, the conclusion that the statute did not apply to it would naturally follow. I have already stated my reasons for not assenting to those premises. The point may probably not now require decision; because the same practical conclusion may be reached by your Lordships (as it has been by all the learned Judges, except the late Lord Chief Justice of *England*, *Mellor*, J., and *Brett*, L.J.), by a different road. But, having regard to its possible importance in other cases, I have not thought it right to withhold the expression of the opinion which, after much consideration, I have myself formed upon it.

Assuming the statute to apply, what would be its effect? The late Lord Chief Justice of *England* thought it would be nugatory. "It was passed" (his Lordship said) "with the view of putting an end to the scandal on the administration of justice which arose from forcing the consciences of juries," to find that there had been a lost grant, when "the presumption was known to be a

(1) 10 C. B. (N.S.) 282.

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mere fiction (1)." But he nevertheless concluded (2) that, except in the case of light, "as regards the effect of twenty years user or enjoyment in the matter of easements by presumed grant, the law stands exactly as it did before the passing of the Act," a conclusion extending as much to those rights of way, &c., which are expressly mentioned in the 2nd section, as to "other easements."

It is undoubtedly true that, under the 2nd section, there is an important difference between a forty years' and a twenty years' user. Forty years user has the same effect which (under the 3rd section) twenty years' user has as to light; it makes the right absolute and indefeasible, unless it is shewn to have been enjoyed by consent or agreement in writing. But twenty years' user, under the 2nd section, may be defeated "in any other way by which" it was previously (*i.e.*, before the 1st of August, 1832) "liable to be defeated," except that it can no longer be defeated or destroyed "by shewing only that it was first enjoyed at any time prior to such period of twenty years." The effect of this, as I understand it, is to apply the law of prescription, properly so called, to an easement enjoyed as of right for twenty years, subject to all defences to which a claim by prescription would previously have been open, except that of shewing a commencement within time of legal memory. To allege that there was no evidence from which a grant could be presumed, or that there was evidence from which it ought to be inferred that there was, in fact, no grant, would not (as I understand the law) have been, before the 1st of August, 1832, a competent mode of defeating or destroying any claim to an easement *by prescription*, and no jury would have been directed to find a grant in any such case, when there was no proof of a commencement within time of legal memory. The section, therefore (assuming it to apply), would in the present case be sufficient to establish a title by prescription to the right claimed by the Plaintiffs, unless it had been enjoyed *vi*, or *clam*, or *precario*. Of *vi*, or *precario*, there is here no question.

Supposing, however, that the 2nd section of the *Prescription Act* ought not to be held to apply to the easement of support, the

(1) 3 Q. B. D. at p. 105. (2) 3 Q. B. D. at p. 119.

same result would practically be reached by the doctrine, that a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user. As to this, I think it unnecessary to say more than that I agree with the view of the authorities taken by *Lush*, J., by the majority of the Judges in the Court of Appeal, and by all the learned Judges who attended this House (unless *Bowen*, J., who preferred to rely upon the equitable doctrine of acquiescence, is an exception) in their answer to the first two questions proposed to them by your Lordships.

Upon the other three questions proposed to the learned Judges, which involve the doctrine of *clam*, as applied to the easement of support, there has been much difference of opinion; four of the learned Judges being in the Plaintiff's favour, and the other three thinking that the jury were not properly directed on that point.

The inquiry on this part of the case is, as to the nature and extent of the knowlege or means of knowledge which a man ought to be shewn to possess, against whom a right of support for another man's building is claimed. He cannot resist or interrupt that of which he is wholly ignorant. But there are some things of which all men ought to be presumed to have knowledge, and among them (I think) is the fact, that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support. When a new building is openly erected on one side of the dividing line between two properties, its general nature and character, its exterior and much of its interior structure, must be visible and ascertainable by the adjoining proprietor during the course of its erection. When (as in the present case) a private dwelling-house is pulled down, and a building of an entirely different character, such as a coach or carriage factory, with a large and massive brick pillar and chimney-stack, is erected instead of it, the adjoining proprietor must have imputed to him knowledge that a new and enlarged easement of support (whatever may be its extent) is going to be acquired against him, unless he interrupts or prevents it. The case is, in my opinion, substantially the same as if a new factory had been erected, where no building stood before. Having this knowledge, it is, in my judgment, by no means necessary that he should have particular

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information as to those details of the internal structure of the building on which the amount or incidence of its weight may more or less depend. If he thought it material, he might inquire into those particulars, and then if information were improperly withheld from him, or if he received false or misleading information, or if anything could be shewn to have been done secretly or surreptitiously, in order to keep material facts from his knowledge, the case would be different. But here there was no evidence from which a jury could have been entitled to infer any of these things. Everything was honestly and (as far as it could be) openly done, without any deception or concealment. The interior construction of the building was, indeed, such as to require lateral support, beyond what might have been necessary if it had been otherwise constructed. But this must always be liable to happen, whenever a building has to be adapted to a particular use. The knowledge that it may or may not happen is in my opinion enough, if the adjoining proprietor makes no inquiry. I think, therefore, that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done *clam*, and that the evidence did not raise any question on this point which ought to have been submitted to the jury.

My opinion, therefore, upon the whole case is in favour of the Respondents, the Plaintiffs in the action, and against the Appellants; and the motion which I have to make to your Lordships is, that the judgment of the Court below be affirmed, and the appeal dismissed with costs. The effect of this will be, that judgment will stand for the Plaintiffs, for £1943, the amount of damages assessed by the Special Referee; the Defendants not having elected to take a new trial within the time allowed them by the order of the Lords Justices; and which option was more than, according to the view which I take of this case, they were entitled to.

LORD PENZANCE:—

My Lords, in dealing with the questions of law to which the present case gives rise, it is material to bear in mind that the exact proposition which the Appellants call upon your Lordships

to repudiate, or affirm, is to be found in the ruling at the trial given by the learned Judge. It is in these words: "The authorities oblige me to hold, that when a building has stood for twenty years it has acquired a right to the support of the adjacent land, and I do not think that it all depends upon whether the opposite or adjacent neigbour had notice, or not, of what was done, or what weight was put upon it, nor does it rest on the fact of there being an implied grant. I think it has become absolute law, that when a building has stood for twenty years, supported by the adjacent soil, it has acquired a right to the support of the soil; and no one has a right to take all that soil without putting an equivalent to sustain the building. That is the ruling which I must lay down here, because that is upheld by many authorities" (1). Your Lordships have now to say whether this view of the authorities is a correct one; and, with some reluctance, I feel constrained to say that in my opinion it is so. I say with some reluctance, not because I think that the support which the Plaintiff claims for his house is unreasonable, or inequitable, but because the circumstances under which the claim is held to arise, are, so far as I am able to discover, incapable of giving rise to it in accordance with any known principle of law.

It must be borne in mind both what the claim is, and what it is not. It is not a claim asserted for the support of a house by the adjacent soil as soon as that house is built; but a claim that when the house has stood "for twenty years supported by the adjacent soil it has by absolute law acquired a right to the support of the soil;" and this not by reason of any implied grant, and quite independently of whether "the opposite or adjacent neighbour had notice or not of what was done or what weight was put upon" the ground to which the lateral support was required.

It is this sudden starting into existence of a right which did not exist the day before the twenty years expired, without reference to any presumption of acquiescence by the neighbour (to which the lapse of that period of time without interruption on his part might naturally give rise) which I find it impossible to reconcile with legal principles. I find myself therefore in entire accord with the opinion which *Fry*, J., has offered to the House; and he

(1) Printed Papers, Appendix, p. 69.

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has so fully and ably illustrated his views on the subject, which are also mine, that I have little to add.

If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbour's house to the ground. It would be, I think, no unreasonable application of the principle "*sic utere tuo ut alienum non lædas*" to hold, that the owner of the adjacent soil, if desirous of excavating it, should take reasonable precautions by way of shoring, or otherwise, to prevent the excavation from disastrously affecting his neighbour. A burden would no doubt be thus cast on one man by the act of another done without his consent. But the advantages of such a rule would be reciprocal, and regard being had to the practicability of shoring up during excavation, the restriction thus placed on excavation would not seriously impair the rights of ownership.

But the matter is not *res integra*. It has been the subject of legal decisions, and those decisions leave it beyond doubt that such is not the law of *England*. On the contrary it is the law, I believe I may say without question, that at any time within twenty years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground. This being so, and these being his legal rights (the rights incident to his ownership), it seems to me that these rights must remain to him, or those who come after him, for all time, unless he, or they, have done something by which these rights have been divested, restricted, or impaired. I find it impossible to conceive, within the application of any legal principles, that mere lapse of time can divest him or them of the rights they once had. Legal rights do not perish by lapse of time, but rather grow confirmed. What I mean to express is this, that the right to excavate the neighbouring soil not being impaired or restricted by the house being built, anything which afterwards impairs or restricts it must proceed from those who possess that right, and cannot come about, all things remaining unchanged, by the mere efflux of time.

In all the cases in which lapse of time is held to stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent, and they are drawn from the fact that the person against whom the right is claimed has for a length of time failed to interrupt or prevent an enjoyment by his neighbour which he might have interrupted had he so pleased. In *Chasemore* v. *Richards* (1) the language held puts this beyond doubt. *Wightman*, J., said that no presumption could be raised from non-interruption unless the person against whom the right is claimed might have prevented it, and Lord *Wensleydale*, in addressing your Lordships, distinctly relied upon the fact that the Defendant was not able to prevent the enjoyment which after a lapse of years had been claimed as a right against him. In the more modern case of *Sturges* v. *Bridgeman* (2) it was distinctly determined that no easement could be created by lapse of time unless the Defendant might have interrupted it. "*Qui non prohibet quod prohibere potest assentire videtur*" is the legal maxim upon which, in my opinion, all the cases of easements of whatever kind acquired by length of time substantially rest.

The question therefore in each particular case must be, could the Defendant have interrupted the enjoyment in question? Now if these words are taken literally all cases are alike, and the question is no question at all. For an action for the disturbance of the enjoyment claimed involves the possibility of its being disturbed, and the fact that the Defendant has at last interrupted the Plaintiff's enjoyment (say of support to his house) which constitutes his cause of action, is a very simple proof, except under special circumstances, that the enjoyment was capable of interruption at an earlier period. The Defendant's power of interruption therefore, in my opinion, means something very different from the mere physical possibility of interrupting. It involves knowledge that the necessity for support existed, and the possibility of withdrawing that support without the expenditure of so much labour

(1) 7 H. L. C. 349. 873 (2) 11 Ch. D. 852.

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or money, or the incurring of so much loss or damage, as a man could not reasonably be expected to incur.

There is direct authority for this proposition to be found in the case of *Webb* v. *Bird* (1) in which *Willes*, J., states the principle which is to be extracted from the previous cases, in the following language:—"In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action, or done some act, to put a stop to the claim, *without an unreasonable waste of labour and expense.*" Nor is any other view of this matter, as it seems to me, consistent with the terms in which a right to be gained by prescription or lapse of time is defined. A claim by prescription to a right of this character is said only to arise when a right, or benefit, enjoyed over a length of time has been enjoyed "*nec vi*," "*nec clam.*" What is the meaning and bearing of these qualifications? or what place could they have in such a definition, unless they point to the fact that the benefit claimed after a lapse of years as a right is one, the existence of which the person against whom it is claimed had the means of knowing, and the enjoyment of which he had the power to stop? And of what importance are these matters, except that they lay the foundation, where the right or benefit has not been interfered with, for presuming that he who might have interfered with them, has granted or consented that they should be undisturbed in future?

Continuous enjoyment without interruption is surely insisted upon as the basis of the right for some reason, and for what reason except that it is the evidence of assent? The physical power to interrupt, if accompanied, as I have above suggested, by a knowledge that the enjoyment of support existed, and by the means of exercising that power of interruption without extravagant and unreasonable loss or expense, may well give ground for an implied assent if it be not exercised for so long a period as twenty years. But if unaccompanied by these qualifications, the fact of non-interruption appears to lead to no conclusion whatever, and the restrictions insisted upon, that the enjoyment must be "open"

(1) 10 C. B. (N.S.) 285; 13 C. B. (N.S.) 841. 8 Jur. N.S. 862

and not sustained by "force," cease to have an intelligent place in the definition. In the present case it is obvious that a power to interrupt is one which, although it has existed, and been physically possible ever since the Plaintiff's house was built, could only be exercised by measures which no man in his senses would take. It would indeed be an unreasonable state of the law which should enforce upon the Defendant, if he wished to retain his original right to excavate his own soil at such time as his interests might require him to do so, that he should pull his own house down, and drag his neighbour's to the ground with it at a time when his interest did not require it, and when it could be nothing but a grievous loss and injury to all parties concerned.

For these reasons I am unable to support the conclusion that a right such as that here in question could be gained by the Plaintiff by anything in the shape of prescription or lost grant; but if I am mistaken in this, I think it is clear that in the present case the question should have been submitted to the jury whether the enjoyment of the support to the house was an "open" enjoyment at all. The house was built in an exceptional manner, and that, which seen from the outside, would appear to be nothing more than an ordinary chimney stack carrying nothing but its own weight, was in truth a pier of brickwork, intended to carry, and in fact carrying, one end of an iron girder, upon which girder the whole upper floor of the house rested. If the Plaintiff's right, therefore, was to be established by prescription, I think it inevitable that the matter should have been dealt with by the learned Judge in the manner clearly described by *Lindley*, J., in his answer to your Lordships' fifth question. And I daresay it would have been so dealt with, if the learned Judge had not considered the Plaintiff's right to stand on a different ground altogether, and asserted it to be an absolute right acquired by twenty years' enjoyment, quite independent of grant, acquiescence, or consent. In so doing he relied, he said, upon the existing authorities. I will not recapitulate them or criticise them individually, as they have been carefully reviewed by others. They constitute the existing law on the subject; and I think the learned Judge has drawn what is upon the whole the correct inference from them, though they are by no means uniform, and although, for the reasons I have given,

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and for those more fully expanded in the opinion of *Fry*, J., I am unable to find a satisfactory legal ground upon which these authorities may be justified. I feel the less difficulty in acquiescing in them, inasmuch as they affirm a right to exist after twenty years, which in my opinion should have been held to exist as soon as the Plaintiff's house was built. The learned Judge's direction at the trial was therefore, in my opinion, correct, and this appeal should be dismissed with costs; and if I have ventured to question the legal principles upon which the authorities which guided him are founded, I have only done so lest this case should be thought an authority for the establishment of other rights more or less similar to the right here in question.

So far as my opinion goes this right, to the lateral support of the soil for an ancient house, stands upon the positive authority of a series of cases and a long acceptance in the Courts of Law, and the ratification of it by your Lordships ought not to be considered as the adoption of principles which might have a wide application in analogous cases.

LORD BLACKBURN:—

My Lords, the first of the defences raised by the pleadings is a denial that the Plaintiffs were entitled to have their buildings supported by the land adjacent thereto. It is on this defence that the most difficult questions arise, and I shall consider it first.

It is, I think, conclusively settled by the decision in this House in *Backhouse* v. *Bonomi* (1) that the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it); but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

This right is, I think, more properly described as a right of property, which the owner of the adjoining land is bound to respect, than as an easement, or a servitude *ne facias*, putting a restriction on the mode in which the neighbour is to use his land;

(1) 9 H. L. C. 503.

but whether it is to be called by one name or the other is, I think, more a question as to words than as to things. And this is a right which, in the case of land, is given as of common right; it is not necessary either in pleading to allege, or in evidence to prove, any special origin for it; the burthen, both in pleading and in proof, is on those who deny its existence in the particular case. No doubt the right is suspended, or rather perhaps cannot be infringed, whilst the adjoining properties are in the hands of the same owner. He may dig pits on his own land, and suffer his own adjoining land to fall into those pits just as he pleases. When he severs the ownership and conveys a part of the land to another, he gives the person to whom it is conveyed (unless the contrary is expressed) not a right to complain of what has been already done, but a right to have the support in future. It is, I think, now settled that the conveyance may be on such terms as to prevent any such right arising (see *Rowbotham* v. *Wilson* (1); *Smith* v. *Darby* (2); *Eadon* v. *Jeffcock* (3); *Aspden* v. *Seddon* (4)). But the burthen both of pleading and proving such a case lies on those setting it up. And I think that the decision of this House in *Backhouse* v. *Bonomi* (5) also conclusively settles this, that though the right of support to a building is not of common right and must be acquired, yet, when it is acquired, the right of the owner of the building to support for it, is precisely the same as that of the owner of land to support for it. Both Lord *Cranworth* and Lord *Wensleydale* say that this right also is more properly to be called a right of property to be respected by the owner of the adjoining land than a negative easement or servitude *ne facias*. Lord *Wensleydale* could not mean to say that the right of support to a house was of common right, and so overrule several authorities, including *Gayford* v. *Nicholls* (6), where he himself had delivered judgment.

In the case now before your Lordships, nothing was proved which could have given rise to this right unless it arose from enjoyment in the manner and subject to the conditions and for the time required by law to give a title by prescription. And

(1) 8 H. L. C. 348.
(2) Law Rep. 7 Q. B. 716.
(3) Law Rep. 7 Ex. 379.
(4) Law Rep. 10 Ch. 394.
(5) 9 H. L. C. 503.
(6) 9 Ex. 702.

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inasmuch as it was clearly proved that, though there had been more ancient buildings on the spot, they were removed, and buildings of a different structure and requiring a different degree of support were erected in their place only twenty-seven years before the excavations complained of, it seems to me clear that the buildings are not ancient buildings in the sense that they or similar buildings, for which in the course of repair they were substituted, had stood there from time beyond memory. The Plaintiffs must (unless the construction of 2 & 3 Will. 4, c. 71, is such as to embrace such a case as this) rely on the comparatively modern doctrine, by which enjoyment of a right appurtenant to land for twenty years or more, under such circumstances as are required by law, is given the effect of prescription, though it is proved that the enjoyment began within living memory.

I do not understand the late Lord Chief Justice *Cockburn* to doubt that such a right as that now in question might be acquired, according to English law, where the building had stood from time immemorial, by enjoyment open and peaceable from time immemorial. It was questioned on the argument at the Bar of this House, whether a right of support for a building could be acquired by any length of enjoyment, even from time immemorial, and I shall consider that later. But the Lord Chief Justice, I think, denied that this right could be acquired by enjoyment for a less time than time immemorial. He said that such enjoyment might give rise to a presumption that there was originally a grant, or at least an assent in point of fact to the enjoyment, but said that when it was proved, or what comes to the same thing, admitted, that the assent of the Defendants' predecessors was not asked for, or obtained by grant or in any other way, the presumption was at an end. This is expressed (1) in terms confined to this particular right, but I think his position is general, and applies to every easement, unless it is claimed under *Lord Tenterden's Act*. This requires examination.

The English Common Law is stated by Lord *Coke* (2). He says, to make prescription, two things are incidents inseparable, possession or usage, and time. Possession must be long, continual, and peaceable. As to "long," Lord *Coke* says: "It is the time

(1) 3 Q. B. D. at p. 118. (2) Co. Lit. 113 b, 114 a.

given by law, which in *England* is the time whereof there is no memory of man to the contrary." But though living memory might not be to the contrary, yet if written evidence shewed that the possession had a beginning, it was defeated. By what *Cockburn*, C.J., seems to think a judicial usurpation of legislative power, the time of legal memory was fixed to be the same as the limitation of real actions by the *Statute of Westminster* (A.D. 1275), viz., the time of *Richard* I., A.D. 1189. This, when first introduced, gave a prescription of about eighty-six years, but being a fixed date it became longer and longer, and already when *Littleton* wrote, in the reign of *Edward* IV., he observes on the inconvenience felt, because the time of limitation of a writ of right is of so long time past.

This inconvenience must have been particularly felt with regard to any rights attached to buildings. For though a few buildings which existed in 1189 still exist, and there are some old cities and towns (not of very great extent) which then existed, and in which it is possible that the ancient buildings have been from time to time repaired without altering their structure, yet far the greater part of the buildings in *England* stand on land which can be shewn to have been first built upon at a much later date.

In *Bedle* v. *Beard*, A.D. 1606 (1), it was held that, though it was proved that there was a time within legal memory when the right claimed had not existed, and consequently the right could not have its origin in prescription, long possession was a sufficient ground for presuming what was necessary to make that possession lawful; and consequently, in that case, where there had been possession for 303 years, for presuming a grant from the Crown, though none was shewn. "This," says Lord *Coke*, "was resolved by Lord *Ellesmere*, with the principal Judges, and on consideration of precedents." So that the doctrine was not then introduced for the first time. But the length of time necessary to give rise to such a prescription was left indefinite, and though I think no one, in that case, could have really believed that there actually had been a grant from the Crown which was lost, that is not said, and it may have been thought that long user was evidence by which the fact might be proved, but that it should not be found unless

(1) 12 Co. Rep. 5.

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believed. The modern doctrine that a jury ought to be directed that if they believed that there had been what was equivalent to adverse possession as of right for more than twenty years, they ought to presume that it originated lawfully, that is, in most cases, by a grant, must certainly have been introduced after the passing of the *Statute of Limitations*, 21 Jac. 1, c. 16 (A.D. 1623), and as the earliest reported decision is that of *Lewis* v. *Price* in 1761, referred to in Serjeant *Williams*' note to *Yard* v. *Ford* (1), the doctrine is probably not much more than a century old. I quite agree with what is said by the late Chief Justice *Cockburn* (2), that where the evidence proved an adverse enjoyment as of right for twenty years, or little more, and nothing else, "no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction." He thinks that thus to shorten the period of prescription without the authority of the Legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of: even where it was originally a blunder, and inconvenient, *communis error facit jus*. But to refuse to administer a long-established law because it was based on a fiction of law, admitted to be for a purpose and producing a result very beneficial, is, as it seems to me, at least as great a usurpation of what is properly the function of the Legislature as it was at first to introduce that fiction.

It is difficult to reconcile all the *dicta* and decisions on the subject. There is language used in *Darwin* v. *Upton*, reported by Serjeant *Williams* in his note to *Yard* v. *Ford* (3), as to the difference between an absolute bar and a presumptive bar which I have never been able to understand. I quite agree that where the evidence is such as to leave it a question whether the enjoyment has been such—open, peaceable, and continual—as to raise a presumption of the right, the jury must be asked to find as a fact whether the enjoyment was of that kind; but the late Chief Justice seems (4) to

(1) 2 Wms. Saund. 504, Ed. 1871.
(2) 3 Q. B. D. at p. 105.
(3) 2 Wms. Saund. 507, Ed. 1871.
(4) 3 Q. B. D. at p. 107.

understand *Darwin* v. *Upton* (1) as amounting to this, that the jury should be told that if the enjoyment has been such as to raise a presumption of a right they may find a grant whether they believe in its existence or not; but that, if they choose to be scrupulous, they need not so find. I cannot believe that the Judges meant that, and if they did, I think the subsequent cases are inconsistent with that ruling. I would more particularly rely on what is said by *Bayley*, J., in *Cross* v. *Lewis* (2). The Judges never altered the form of pleading, and it was still necessary for a Defendant setting up a right as a defence, to plead it with particularity: see *Hendy* v. *Stephenson* (3). In *Campbell* v. *Wilson* (4) the Defendant pleaded, first, a way by prescription, which was traversed; and, secondly, that *Bryan Grey* was seised in fee of the *locus in quo*, and that *Joseph Wilson* (under whom the Defendant made title by devise) was at the same time seised in fee of an adjoining moss dale, and that by deed, lost by time and accident, *Bryan Grey* granted a right of way over the *locus in quo* to *Joseph Wilson* and his heirs. The replication traversed the grant. At the trial in 1803, before *Chambre*, J., it appeared that in 1778, by an award made under an Inclosure Act, all ways not set out in the award were extinguished. And this way was not set out in the award. This put an end to the plea of prescription, and it would also have put an end to the second plea, unless the alleged grant by *Bryan Grey* was made subsequent to the award, that is, within twenty-five years next before the trial, and, of course, within less than that time before the plea was pleaded, in which it was alleged that the deed was lost by time and accident. But evidence was given that there had been, for more than twenty years, an adverse enjoyment of the right of way. Now, if the issue joined was to be understood in its literal and natural sense, it could hardly have been suggested that this was evidence to justify the Judge in leaving it to the jury whether, in fact, in the short interval between the making of the award and the commencement of the twenty years' enjoyment, not more than two or at most four years, there actually had been a grant since lost. But so to construe the issue would have made the question of

(1) 2 Wms. Saund. 507, Ed. 1871.
(2) 2 B. & C. 686.
(3) 10 East, 55.
(4) 3 East, 294.

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whether there was a right, to depend on the accident of whether the right was set up by a Plaintiff complaining of an obstruction to it, or a Defendant justifying under it. *Chambre*, J., who was a very learned pleader, does not seem to have had the least doubt of the meaning of the issue. He never said one word to the jury as to the reality of the grant, but left it to them to presume it, if satisfied that the enjoyment was adverse, and had continued twenty years before the action. And this direction was approved of by Lord *Ellenborough* and the whole Court of King's Bench, the only question on which they seem to have had any difficulty being as to whether there was a proper direction given as to the nature of the enjoyment which would give rise to the presumption that the Defendant acted by right. And in *Penwarden* v. *Ching* (1), where issue was taken on a plea justifying a trespass in defence of an ancient window, and on the trial in 1829 it was proved before *Tindal*, C.J., that the window was first erected in 1807, that learned Judge said that "the question is not whether the window is what is strictly called ancient, but whether it is such as the law, in indulgence to rights, has in modern times so called, and to which the Defendant has a right, for this is the substance of the plea." The verdict was for the Plaintiff, so that this ruling could not be reviewed, but it was the ruling of a Judge who was a very learned pleader. In both those cases, and in many more, if the question had been whether there really in fact had been a grant, or really in fact the window was ancient, there could have been no possible question. It was, no doubt, desirable that such artificial doctrines should be dispensed with. *Lord Tenterden's Act* (2 & 3 Will. 4, c. 71), so far as it went, made that a direct bar which was before only a bar by the intervention of a jury and the use of an artificial fiction of law. But it did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. But this was not done: see *Aynsley* v. *Glover* (2). I think the law, as far as regards this subject, is the same as it was before that Act was passed. Neither can I agree with what seems thrown out by *Lush*, J., rather as a makeweight than as a substantial ground of decision, that the more recent *Limitation Act*

(1) Mood. & M. 400.

(2) Law Rep. 10 Ch. 283.

(3 & 4 Will. 4, c. 27) which put an end to the doctrine of adverse possession, has made any difference in the law. This view of the matter renders it unnecessary to decide anything as to the construction of *Lord Tenterden's Act* (2 & 3 Will. 4, c. 71), and I wish to say nothing that may prejudice the decision of that question if hereafter it becomes material.

I scarcely think that, if this had been the only point argued at your Lordships' bar on the first occasion, it would have been thought of sufficient difficulty to ask the opinions of the learned Judges. But it is satisfactory to find that they all agree that a building, which has *de facto* enjoyed (under the circumstances and conditions required by the law of prescription) support for more than twenty years, has the same right as an ancient house would have had.

I am glad that the recent alterations in the law have obviated the necessity of putting such very artificial constructions on issues as I have mentioned. But I am not able to agree with *Bowen*, J., in thinking that the alterations in the modes of procedure and the fusion of law and equity have made any alteration in the substance of the law. I quite agree with him in thinking that circumstances might, and often did, give rise to an equity to protect a house which would not have given rise to a legal claim to maintain an action at law. But those circumstances must always have existed in fact, and generally there must have been notice of them. I cannot think the alterations in procedure have altered the law.

On the first argument at the Bar of this House in November, 1879, when the Lords present were the then Lord Chancellor (Earl *Cairns*), Lord *Penzance*, and myself, a very able argument was addressed to this House by the then Attorney-General (1) and the now Solicitor-General (2), and at the close of it the Lord Chancellor summarized the argument (I took a note of it at the time), and asked if this was a correct statement of their proposition ;—" In order to gain for the owner of land, by enjoyment, a title to some advantage from or upon his neighbour's adjacent close, greater than would naturally belong to him, the

(1) Sir *John Holker*. (2) Sir *F. Herschell*.

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advantage must be one the enjoyment of which is or ought to be known to the neighbour, and could, without destruction or serious injury to his own close, be interrupted by him." And this was accepted by the Attorney-General as truly representing the argument. As 2 & 3 Wm. 4, c. 71, was couched in terms which, as it has been held, prevented its applying to this case, it might be necessary in considering this proposition, to decide questions of great importance, which had never yet been finally decided; and, therefore, it was deemed advisable to have the assistance of the learned Judges, and a further argument was ordered.

I do not think anything was said at the second argument that was not involved in the summary of the first argument which I have above quoted. It was admitted that if the proposition was correct, no lapse of time, not even from time immemorial, could give a right of support to a building, such as to oblige the owners of adjoining land to respect it; and that the same would have been before 2 & 3 Will. 4, c. 71, and still was in cases not within its provisions, the law as to the acquisition by enjoyment of the right to require the neighbours to respect the access of light and air to a window, unless it made a difference that the enjoyment in this latter case could be easily interrupted. And reference was made to cases which were said to be analogous, such as that of keeping land undrained, so as to act as a reservoir for springs: *Chasemore* v. *Richards* (1); or that of claiming to have uninterrupted the access for the wind to a windmill: *Webb* v. *Bird* (2); and it was said that the principle on which those cases were decided was one which shewed that there was no right of support acquired by the common law prescription for a building, though it had stood for time immemorial, and if that was so, there could be none by the prescription for a shorter period created by the modern decisions; for I agree with *Bramwell*, L.J., where, in *Bryant* v. *Lefever* (3), he says that what he calls the expedient, introduced by these decisions, is ancillary to the doctrine of prescription at common law, and applicable in cases where something prevents the operation of the common law prescription from

(1) 7 H. L. C. 349.
(2) 13 C. B. (N.S.) 841; 31 L. J. (C.P.) 335.
(3) 4 C. P. D. 175.

time immemorial; and is therefore only applicable where the right claimed is such as, if immemorial, might have been the subject of prescription.

My Lords, during the very considerable interval that elapsed between the first argument in November, 1879, and the time when the opinions of the learned Judges were delivered, the 15th of March, 1881, I have at intervals bestowed consideration on this proposition, and though I refrained from finally coming to a decision till I had the advantage of considering their opinions, I was strongly impressed with the conviction that such a right as is here claimed, was, according to the established law of *England*, one which might be acquired by prescription. And I find that all the Judges agree in that result, though not entirely for the same reasons, and I am not sure that any of them would have quite assented to the train of reasoning which has led me to that same result. On a minor point—whether there should be a new trial because the Judge at the trial left no question to the jury when, as it was said, there was or might have been evidence produced which would raise a question of fact which might have been a defence,—the learned Judges are divided in opinion; *Lindley*, *Lopes*, and *Bowen*, JJ., agreeing with the majority of the Court of Appeal that there should be a new trial; *Pollock*, B., and *Field*, *Manisty*, and *Fry*, JJ., thinking that there should not. It is not necessary to choose between the divers reasons which led them to the same result on the first point. It may be necessary to do so on this minor point, where their reasons led to different results. I have come to the conclusion that there should not be a new trial. I will state the reasoning which has led me to these conclusions.

My Lords, I cannot agree that the only principle on which enjoyment could give the owner of property a prescriptive right over a neighbour's land exceeding what would, of common right, belong to the owner of that property, was acquiescence on the part of the neighbour. Nor even that it is the chief principle. In general such enlarged rights are of such a nature that those over whose property they are enjoyed could in the beginning have stopped them; and a failure to stop them is evidence of acquiescence, and may afford a ground for finding that there was

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an actual assent, but that is, in many if not in all cases, a fiction; there is seldom a real assent. But no doubt a failure to interrupt, when there is power to do so, may well be called laches, and it seems far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time shall bar the true owner when the true owner has been guilty of laches, than to say that for the public good the true owner shall lose his rights, if he has not exercised them during the prescribed period, whether there has been laches or not; but there is not much hardship. Presumably such rights if not exercised are not of much value, and though sometimes they are "*Ad ea quæ frequentius accidunt jura adaptantur.*" This ground of acquiescence or laches is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shews that the principle on which prescription is founded is more extensive.

Prescription is not one of those laws which are derived from natural justice. Lord *Stair*, in his Institutions, treating of the law of *Scotland*, in the old customs of which country he tells us prescription had no place (book 2, tit. 12, s. 9), says, I think truly, "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it."

It was called by the old Roman lawyers *Usucapio*, which is defined (Dig. lib. 41, tit. 3, *De usurpationibus et usucapionibus*, art. 3,) to be "*adjectio dominii per continuationem possessionis temporis lege definiti.*" And in the same book and title, art. 1, the reason is given,—"*Bono publico usucapio introducta est ne scilicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium.*" This is precisely the object with which modern Statutes of Limitations are established, and it would be baffled if there was to be a further inquiry as to whether there had been acquiescence on the part of the true owner. It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under

disabilities or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern Statutes of Limitations, but I take it that these are positive laws, founded on expedience, and varying in different countries and at different times. The minor question whether there should be a new trial, in my mind, depends on the question what positive laws have been adopted by the English Courts. To return to the Roman law, *Usucapio*, it will be noticed, was confined to the *dominium*, nearly equivalent to the modern phrase of the legal estate. It was enunciated in the laws of the Twelve Tables, in terms brief, to the extent of being obscure, and simple to the extent of being rude—"*Usus auctoritas fundi biennium, cæterarum omnium annuus est usus.*" This for centuries, down to the time of *Justinian*, continued to be the law, as far as regarded the *dominium*, within the old territory of the republic, but side by side with it, the Prætors introduced, by their edicts, a *jus prætorium*, nearly equivalent to the modern phrase of equity, which practically superseded the old law, and in the provinces was the only law. No one who has ever looked at the Digest will complain of this Prætorian law as brief; nor will any one who has read any portion of it fail to admire the skill with which legal principles are worked out. Some of the edicts of the Prætors are so obviously just and expedient, and are so tersely expressed, that they have been generally adopted, and are quoted as legal maxims by those who often do not know whence they came. Two edicts were restitutory:—"*Prætor ait, Quod vi aut clam factum est qua de re agitur id cum experiendi potestas est, restituas*" (Dig., lib. 43, tit. 24, art. 1.) This relieved the true owner from the *usucapio* which transferred the *dominium* in consequence of a possession of two years if the possession was not peaceable, or not open.

"*Ait Prætor, Quod precario ab illo habes aut dolo malo fecisti ut desineres habere qua de re agitur, id illi restituas*" (Dig., lib. 43, tit. 26, art. 2). This relieved him from the effect of a possession of two years if it was not adverse, or if it was fraudulent. By a prohibitory edict, "*Uti possidetis*" (Dig. lib. 43, tit. 17), the Prætor forbad any one to disturb, by force, any possession which had been obtained "*nec vi, nec clam, nec precario.*" And on the

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basis principally, but not exclusively, of those three edicts, the Prætors established what was called the "*præscriptio longi temporis.*" I will read what *Pothier* says in his treatise "*De la Prescription, Article Préliminaire, Article* 3." I quote from the eighth volume of *Pothier's* works by M. *Dupin*, p. 390:—"*Suivant ce droit du préteur le possesseur de bonne foi, qui avait eu une possession paisible et non interrompue soit d'un droit incorporel, soit d'un héritage qui n'était pas du nombre de ceux qui étaient* res mancipi *pendant le temps de dix ans* inter præsentes, *et de vingt ans* inter absentes, *acquérait après l'accomplissement du temps de sa possession, non le domaine de la chose, mais une prescription ou fin de non recevoir, à l'effet d'exclure la demande en revendication du propriétaire de la chose, qui n'aurait été intentée qu'après l'accomplissement de ce temps. Depuis, on avait aussi accordé une action utile à ce possesseur pour revendiquer la chose, lorsqu'il en avait perdu la possession après l'accomplissement du temps de la prescription.*" Thus the Prætors, whilst professing to leave the Law of the Tables in force, at least within the old territory of the Republic, practically deprived it of all force. *Justinian* by two laws (Codex, lib. 7, tit. 25), "*De nudo jure Quiritium tollendo,*" and tit. 31, "*De usucapione transformanda,*" changed all this. The two laws are couched in terms that shew that those who framed them had very little respect for antiquity, and were intolerant of legal fictions. *Justinian,* says *Pothier,* by these enactments has changed the prescription of ten and twenty years into a true "*usucapio,*" for they have caused the "*dominium*" to pass to the possessor of the heritage, or the incorporeal right of which he has had during that time a possession or quasi-possession peaceable and not interrupted.

The name of prescription has, however, survived the thing. And in the numerous provinces into which *France* was before the Revolution divided, many of which were governed by their own customs, the laws of prescription varied. *Domat* in his treatise on the Civil Law (I quote from the translation by Doctor *Strahan*), book 3, title 7, s. 4, says: "It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in many of the customs. Every usage hath its views, and considers in the opposite usages

their inconveniences. And it sufficeth to remark here what is common to all these different dispositions of the Roman law, and of the customs as to what concerns the times of prescriptions. Which consists in two views; one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them; and the other to give peace and quiet to those whom others would disturb in their possessions or in their rights after the said time is expired." Those who framed the *Code Napoléon* had to make one law for all *France*. To facilitate their task they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (*Code Civil*, Arts. 688, 689). Those divisions, and the definitions, were, as far I can discover, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English law authority before *Gale* on Easements in 1839. On this division their legislation was founded. The first Projet of the Code allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The *Code Civil* as it was finally adopted by Article 690, allows servitudes, if continuous and apparent, to be acquired by title or by possession for thirty years, and by Article 691 enacts that continuous servitudes not apparent and servitudes, if discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired. The authors of *Lex Pandectes Françoises* (*Paris*, 1804), on whose authority I state this, say (1), that this great change from the principle of the Projet was made without any publication of the discussions concerning it, or of the reasons that led to it. And they state more openly than I should have expected in a book published in *Paris* in 1804, that in their opinion it was not an improvement. It certainly has never been received in English law.

I think that what I have above stated is quite enough to confirm Lord *Stair's* position that the laws of different countries relating to prescription are positive laws differing in matter,

(1) Vol. v. p. 488.

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manner, and time in different countries. I think that, though the English law as to prescription was, beyond controversy, greatly derived from the Roman law, the very words of which are often quoted in the earliest English authorities, yet, to borrow the idea expressed by *Domat* in the passage I have above cited, every system of law is founded on its own ideas of expediency, and that we must look to the English decisions to see what principles have been adopted in it, as upon the balance of inconvenience and convenience expedient, and what have in it been rejected as on the balance inexpedient.

It cannot be disputed that from the earliest times the owner of adjoining land was bound to respect the access of light and air acquired by enjoyment of an ancient window. The immemorial custom of *London* to build upon an ancient foundation, though thereby an ancient window was obstructed, which was pleaded and held to be a good custom in *Hughes* v. *Keme*, A.D. 1613 (1), proves the great antiquity of this law. But as far as I find, the first mention of it in a reported case is *Bowry and Pope's Case* (2). I will read the whole of it, for though the point actually decided was only that a window first erected in the reign of Queen *Mary*, that is, after 1553, and not later than 1558, had not acquired in 1587 the status of an ancient window, I think the opinion of the Court on points not actually decided is important. "*Bowry* brought an action upon the case against *Pope*, and declared that in the time of *Edward* VI., the Dean and Chapter of *Westminster* leased two houses in *St. Martin's*, in *London*, to *Mason* for sixty years. The which *Mason* leased one of the said houses to one *A.*, and covenanted by the indenture of lease with the said *A.*, that it should be lawful for the said *A.*, his executors and assigns, to make a window in the shop of the house so to him assigned, and afterwards in the time of Queen *Mary* a window was made accordingly where no window was there before. And afterwards *A.* assigned the said house to the Plaintiff. And now *Pope*, having a house adjoining, had erected a new building *super solum ipsius Pope ex opposito* the said new window, so as the new window is thereby stopped. The Defendant pleaded not guilty, and it was found for the Plaintiff. And it was moved for the Defendant in arrest of judg-

(1) Yelv. 215. (2) 1 Leon. 168; Michaelmas, 29 & 30 Eliz. A.D. 1587.

ment that here upon the declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the Plaintiff's own shewing to be of late erected *scilicet* in the time of Queen *Mary*. The stopping of which by any act upon my own land was held lawful and justifiable by the whole Court. But if it were an ancient window time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatsoever, and such was the opinion of the whole Court. But if the case had been that the house and soil upon which *Pope* had erected the said building had been under the estate of *Mason*, who covenanted as above said, then *Pope* could not have justified the nuisance, which was granted by the whole Court."

It is for this last opinion that I cite the case. The Court of Common Pleas do not seem to have felt the difficulty which pressed so strongly on *Littledale*, J., in *Moore* v. *Rawson* (1), and which leads *Fry*, J., in his very able opinion, to declare that this right does not lie in grant. They seem to have had no doubt that the express covenant operated as a grant of the window, and that neither *Mason* nor any who held under his estate, could derogate from that grant by stopping the benefit of the window.

In Trinity, 29 Eliz., about nine months later, the Queen's Bench, in *Bland* v. *Moseley*, decided the second point resolved by the Common Pleas the same way, and they also seem to have agreed with the third resolution. The case is cited in *Aldred's Case* (2). The reasons, as reported by Lord *Coke*, are: "It may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning; and *Wray*, C.J., then said that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said *et vescitur aura ætherea*, and the said words *horrida tenebritate* are significant, and imply the benefit of the light. But he said that for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof,

(1) 3 B. & C. 332.

(2) 9 Co. Rep. 58 b.

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and yet it is a great commendation of a house if it has a long and large prospect, *unde dicitur, laudaturque domus longos quæ prospicit agros.* But the law does not give an action for such things of delight."

It will be noticed that not a word is said about the possibility of obstructing the light; and, indeed, it seems to me clear that no one could ever have thought of stopping his neighbour's lights by hoardings, until it was established that uninterrupted enjoyment for a period short of time immemorial would give a right. Then some ingenious lawyer thought of that easy mode of preventing the acquisition of a right in a window not yet privileged. The distinction between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord *Hardwicke* in *Attorney-General* v. *Doughty* (1), where he observes that if that was the case there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shews that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb* v. *Bird* (2) and *Chasemore* v. *Richards* (3) are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction the law has always, since *Bland* v. *Moseley*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement.

Shury v. *Pigott*, decided in 1625, is reported in *Palmer*, 444, *Popham*, 166; 3 *Bulstrode*, 339; *Noy*, 84; *Latch*, 153; and *W.*

(1) 2 Ves. Sen. 453.

(2) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841.

(3) 7 H. L. C. 349.

Jones, 145. It seems to have excited a good deal of attention, and many things collaterally to have been discussed which were not necessary for the decision. The actual point decided in *Shury* v. *Pigott* was, that in a conveyance there was (though nothing was said), an implied grant that neither the conveyor nor any who claimed under him should use their lands so as to deprive the property conveyed of what was necessary for its enjoyment, in that case an artificial supply of water; a principle which, in the case of a house, would certainly include support.

In *Palmer* v. *Fleshees* (1) the first point ruled by *Twysden* and *Wyndham*, JJ., was, "if I, being seised of land, lease forty feet to *A.*, to erect a house upon it, and other forty feet to *B.* to erect a house on it, and one of them builds a house, and then the other dig a cellar in his land by which the wall of the first house adjoining falls, no action lies for this. And so they said it had been adjudged in *Shury* v. *Pigott's Case* (2), for each can make the best advantage of his own, but to them it seemed that the law was otherwise if it had been an ancient wall or house which fell by this digging." The reference to *Shury* v. *Pigott* (2) shews that in this place "ancient" means "existing before the conveyance of the land." The point actually decided was as to light, and the *ratio decidendi* is thus stated in the report in 1 *Levinz*, 122. "It was resolved that, although it be a new messuage, yet no person who claims the land by purchase under the builder" (vendor) "can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by *Twysden* and *Windham*, JJ., *Hyde* being absent and *Kelynge* doubting. For the lights are a necessary and essential part of the house. And *Kelynge* said, Suppose the land had been sold first and the house after, the vendee of the land might stop the lights. *Twysden*, to the contrary, said, Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights in the hands of the vendor or his assigns. But all agreed that a stranger having lands adjoining to a messuage newly erected, may stop the lights, for the building of any man on his lands

(1) 1 Sid. 167.
(2) Palmer, 444; Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; W. Jones, 145.

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cannot hinder his neighbour from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription." I say nothing as to the questions whether there is an implied reservation where the lands are parted with, as well as an implied grant where the house is parted with; or whether, when the land is sold before the house is erected on it, but on the terms that a house is to be built, the purchaser is driven to have recourse to equity to protect his subsequently built house; as neither of these questions is raised by the facts in the present case. But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house.

Now, if the motive for introducing prescription is that given in the Digest, lib. xli., tit. 3, art. 1, quoted before, I think it irresistibly follows that the owner of a house, who has enjoyed the house with a *de facto* support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it by shewing that it was not originally given to him. And I think that the decisions ending in *Backhouse* v. *Bonomi* (1), which is put in a very clear light by *Manisty*, J., in his opinion, decide that he should not be deprived of it. *Fry*, J., thinks those decisions are contrary to principle, but too strong to be departed from. I have come to the conclusion, for the reasons I have given, that they are founded on principle.

But it still remains to inquire whether any of the doctrines established by the English law, which on the ground of expediency prevent the acquisition of a right by enjoyment, would apply.

In *Backhouse* v. *Bonomi* (1) the workings which did the mischief were at a considerable distance from the Plaintiff's house, and

(1) 9 H. L. C. 503.

would not have done any harm if the intervening minerals had not been previously removed by the Defendant. Very different considerations may arise where the intervening minerals have been removed by the Plaintiff himself, or those under whose estate he claims, or even by a third person. I express no opinion as to this, because it is not raised by the facts; but I mention the *Corporation of Birmingham* v. *Allen* (1), as *Lush*, J., did below, to shew that it has not been overlooked.

Neither do I think it necessary to express any opinion as to the distinction taken in *Solomon* v. *Vintners' Company* (2), where it was said that, at all events, the right, if it could be acquired against the next adjoining house, could not be acquired when there were intervening properties, for, in this case, the Defendants' land which they excavated was next adjoining to the Plaintiffs' house; and I think the right to support from the adjoining land is not open to the objection that it is extensive and indefinite, and so far analogous to a prospect. It seems much nearer in analogy to the right to the access of light to a window; perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window. But I see no ground for doubting that the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it, is, for the reasons given by *Lush*, J. (3), one very little onerous to the neighbours, and one which it is expedient to give to the owner of the house.

No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title.

But a question does arise as to whether there was not, or at least might have been, evidence of something which would prevent the enjoyment here being of that nature which would give rise to prescription on the ground that the possession was not open. The edict of the Prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open. And in cases where the

(1) 6 Ch. D. 284. (2) 4 H. & N. 585. (3) 3 Q. B. D. 89.

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enjoyment was in the beginning wrongful, and the owner of the adjoining land may be said to have lost the full benefit of his rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his laches, must have known what the enjoyment was, and how far it went. But in a case of support where there is no laches, and the rights of the owner of the adjoining land are curtailed for the public benefit, on the assumption that, in general, rights not exercised during a long time are not of much value, and that it is for the public good that such rights (generally trifling) should be curtailed in favour of quieting title; where that is the principle, I do not see that more can be requisite than to let the enjoyment be so open that it is known that some support is being enjoyed by the building. That is enough to put the owner of the land on exercising his full rights, unless he is content to suffer a curtailment, not in general of any consequence. And in the present case all that is suggested is that the Plaintiffs' building was not an ordinary house, but a building used as a factory, which concentrated a great part of its weight on a pillar. It had stood for twenty-seven years, and, as far as appears, would, but for the Defendants' operations, have stood for many more years; and there was nothing in the nature of concealment. Any one who entered the factory must have seen that it was supported in a great degree by the pillar. And there is not the slightest suggestion that those who made the excavation were not perfectly aware that the factory did rest on the pillar, or that they took such precautions as would have been sufficient if the building had been supported in a more usual way, but that the mischief happened from its unusual construction. That being so, I am at a loss to see what question the learned Judge could, at the trial, on this evidence have left to the jury, beyond the question whether the building had for more than twenty years openly, and without concealment, stood as it was and enjoyed without interruption the support of the neighbouring soil. The Judge offered to ask the jury if the building fell on account of the weight of the goods stored on the upper storey, and I cannot see what else could have been asked.

The second defence is a question of pure law. Ever since *Quarman* v. *Burnett* (1) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne Railway Co.* (2); *Pickard* v. *Smith* (3); *Tarry* v. *Ashton* (4).

I do not think either side disputed these principles, nor that, in *Bower* v. *Peate* (5), the Queen's Bench Division thought that the case of a man employing a contractor to excavate near the foundation of a house which had a right of support, fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Butler* v. *Hunter* (6) was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But assuming that the Defendants are right in saying that it was such as to make the case not distinguishable from *Bower* v. *Peate* (5), I think that the reasoning in *Bower* v. *Peate* (5) is the more satisfactory of the two.

My Lords, the Court of Appeal in this case ordered that unless the Defendants elected within fourteen days to take a new trial, judgment should be entered for the Plaintiffs. If your Lordships take the view of the case which I have stated, and which is that of *Lush*, J., *Pollock*, B., *Field*, *Manisty*, and *Fry*, JJ., it will be sufficient to dismiss the appeal, for the time for the election to take a new trial is long passed, and it need not be noticed.

(1) 6 M. & W. 499.
(2) 6 H. & N. 488.
(3) 10 C. B. (N.S.) 473.
(4) 1 Q. B. D. 314.
(5) 1 Q. B. D. 321.
(6) 7 H. & N. 826.

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LORD WATSON:—

My Lords, it is unnecessary for me to make any lengthened observations in this case. Seeing that my opinion is in substantial concurrence with what has already been said, few words of explanation will suffice to express my views.

I am of opinion that a right to lateral support from the adjoining soil may be acquired for a building which has enjoyed that support peaceably and without interruption for the prescriptive period of twenty years. That proposition appears to me to have been recognised as the law of *England* in a long series of weighty, if not conclusive, judicial opinions, and to have been tacitly accepted by this House in the case of *Backhouse* v. *Bonomi* (1).

The obligation which the creation of such a right by user imposes upon the owner of the adjacent soil, is to give continued support to the building. Consistently with that obligation he can make any lawful use of his land which he thinks proper. He may dig into, or even remove, the strata from which the building derives support, provided he gives efficient substituted support, by means of a retaining wall or other device. The proprietor of the building cannot, according to the decision in *Backhouse* v. *Bonomi* (1), complain that his right has been infringed, unless and until the stability of the edifice has been affected by the withdrawal of its lateral support. I agree with the noble and learned Lord on the woolsack in holding the right in question to be a proper easement, and in the results which follow from taking that view of its character. In one sense every easement may be regarded as a right of property in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest in land which belongs to another, whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement. But a right constituted in favour of estate *A.* and its owners, in or over the adjoining lands of *B.*, is in my opinion of the nature of an easement, and that whether such right is one of the natural incidents of property, or has its origin in grant or prescription.

(1) 9 H. L. C. 503.

I am unable to regard the right of support to a building, whether lateral or vertical, as a negative easement, and I concur in the observations which have been made upon that point by the noble and learned Lord on the woolsack, as well as by *Lindley* and *Bowen*, JJ. It appears to me to be as truly a positive easement, as the well known servitude *oneris ferendi*, when a wall or beam is rested on the servient tenement. The distinction between positive and negative easements may not be of vital importance in the present case; but in dealing with this point I am probably influenced by the consideration that a decision to the effect that an easement of lateral support to buildings is negative, would form an unsatisfactory precedent in another part of the country where positive servitudes alone are capable of being acquired by prescriptive enjoyment.

It appears to me, for reasons which have already been fully explained by your Lordships, that the Respondents have adduced proof of possession for the prescriptive period sufficient to establish their right to support from the adjacent soil, for the new or altered building which has stood for the last twenty-seven years. I do not think that any question of fact is disclosed by the pleadings or by the evidence in the case, which ought to have been, but was not, submitted to the jury.

Upon the point of law which was not remitted to the learned Judges who have favoured the House with their opinions upon the main questions arising in this appeal, I agree with your Lordships. The operations of the Commissioners were obviously attended with danger to the building in question; but these Appellants seek to shelter themselves from responsibility by proving that they took their contractor bound to adopt all measures necessary for ensuring the safety of the building. When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is per-

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formed, and is therefore liable, as well as the contractor, to repair any damage which may be done.

I therefore concur in the judgment which has been proposed by your Lordships.

Judgment affirmed, and the appeals dismissed with costs.

Lords' Journals, 14th June, 1881.

Solicitors for Appellant *Dalton*: *Prior, Bigg, Church, & Adams.*

Solicitors for Appellants the Commissioners: *Hare & Fell, for Solicitor to the Treasury.*

Solicitors for Respondents: *Shum, Crossman, Crossman, & Prichard, for Stanton & Atkinson, Newcastle-on-Tyne.*

[HOUSE OF LORDS.]

PATERSON AND OTHERS . . . . . APPELLANTS; H. L. (Sc.) 1881 July 12.

PROVOST, &c., OF ST. ANDREWS . . AND JAMES BAIN AND OTHERS . . . . . RESPONDENTS.

Power of Magistrates in the exercise of Administration to make Road over Land held for Public Recreation—Constitution of new Rights and Burdens—Alienation of Solum.

Magistrates for a burgh held the links from time immemorial for behoof of the inhabitants, and, *inter alia*, subject to the obligation of preserving the same for the purposes of the game of golf and for the recreation and amusement of the inhabitants. They had from time to time exercised powers of administration and management over the links, such as the letting of the pasturage, the regulation of bleaching clothes on the links, the construction of a sloping walk, and the levelling and filling up other portions of the ground. The magistrates proposed to make a macadamised road along the outside boundary of the links, where that boundary adjoins certain feus let off by them in 1820, which feus are no longer, in point of law, part of the links.

P., an inhabitant of the burgh and member of the principal golfing club there, and others, the Appellants, sought by note of suspension and interdict to restrain the magistrates either from making the road or from permitting any road to be used in that place for wheel traffic:—

Held, substantially affirming the decision of the Judges of the Court below, but altering their interlocutor, that the evidence proved that the proposed road would have no substantial interference with the obligation of golfing, &c., and that the road might be reconciled with its due observance; but that it was inconsistent with that obligation for the magistrates to alienate any part of the *solum* of the ground in question, or to abdicate their existing powers of administration either by granting private easements to particular individuals, or, having made the road, to create a public easement by dedicating it to the public.

Costs—Alteration of Interlocutor.

Held, also, that the Respondents were not entitled to their costs in the appeal on the grounds that the alteration made in the interlocutor of the Court below was wanted to give complete security to the interests represented by the Appellants; and because the attitude of both sets of Respondents before action brought was such as to justify the institution of some action for the purpose of obtaining the declarations now obtained.

APPEAL from a decision of the Second Division of the Court of Session, *Scotland*.

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The links of *St. Andrews* consist of an extensive area of turf and sand bounded by the sea, and adjacent to the city of *St. Andrews*. They have been for centuries vested in the magistrates and town council of *St. Andrews*, under ancient charters confirmed by the Crown.

In 1797 the town council feued off the western portion, inserting in the conveyance certain reservations with the view of preserving to the inhabitants the use of the links, and that no hurt should be done to the golf links. But from this conveyance was excluded the ground to the east of a place called the *Swilkin Burn*. The links so reserved are admittedly held by the magistrates and town council of *St. Andrews* from time immemorial for behoof of the inhabitants, and, *inter alia*, subject to the obligation of preserving the same for the purposes of the game of golf, and for the recreation and amusement of the inhabitants. It is solely with this eastern portion that the present action has to do.

In 1820 the magistrates feued off about two and a half acres of the links situated at the southern extremity, and running from the *Swilkin Burn Bridge* eastward to a street known as *Golf Place*. The northern boundary of these feus was the links, and the southern the turnpike road leading from the town to the railway station.

The only serious resistance to the town council feuing off this land was made by the principal golfing club of *St. Andrews*, and this opposition was withdrawn on the town council undertaking not to encroach further on the golfing course as then unalterably fixed, and that they would allow the club to erect a club-house on a piece of ground at the end of the links.

Several of the feus thus given off were built upon at the time with houses facing the public road forming the southern boundary, the gardens or yards of these houses running down to the links, from which they were divided by a wall with a gate.

Prior to 1849 the ground immediately to the north of the feus was of so rough and uneven a character as to prevent carts and carriages passing over it. But in that year Sir *Hugh Playfair*, the then provost of the city, caused this strip of ground, for the breadth of several yards out from the boundary of the feus, to be levelled and formed into a terrace, on which seats were placed at intervals. And in order to prevent the passage of carts and other

vehicles, posts with chains were placed across the terrace near each extremity; and also at *Clark's Wynd*, some distance to the west, where that road crossed the links from the turnpike road to the sea.

On certain of the feus given off in 1820 houses were not built until after 1870; then they were built so as to face the links to the north, the fronts of the houses coming close up to the southern boundary of the links. Since the erection of these houses the narrow strip of links forming the terrace made by Provost *Playfair* has come to be used as a cart and carriage access to them; and in consequence has become ploughed up and full of cart ruts, and in wet weather was a source of great inconvenience. In 1874 the feuars proposed to make, with the permission of the town council, a macadamised road twenty-one feet wide, from *Golf Place* to the end of *Clark's Wynd*; and the council resolved to allow the feuars to make the road, provided, *inter alia*, that they bound themselves and their successors to maintain it in all time coming. To this the feuars did not then agree, and the subject dropped. Meanwhile, although there was no regular made road, a track had been formed along the edge of the links in front of the new houses. In 1878 the state of this track led to numerous complaints. The royal and ancient golf club asked the town council to erect a fence between the golfing green "and the road which now passes along by the houses abutting upon the links, so as to prevent conveyances encroaching further on the links at this point." The town council appointed a committee, in order that they might confer with the proprietors interested in having a road at the links. Subsequently this committee was asked to ascertain what sum the feuars would be willing to pay for the use of the road. The committee reported that the feuars offered £5 for permission to make the road.

At another meeting in October, 1878, a second committee was appointed to report as to the best means to be adopted for the strict preservation of the links. This committee, of whom Mr. *John Paterson*, one of the Appellants, was one, reported against the appropriation of any part of the links for a carriage road, and recommended that the council should replace the posts as they were a few years ago, and also to place additional ones at such new

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places where the illegal thoroughfare is attempted. This report was not approved of. At a meeting of the council on the 5th of February, 1879, the council resolved to put in no posts at the links in the line of the carriage track by the houses.

Thereupon Mr. *John Paterson*, who as well as being a town councillor was a member of the chief golf club and a resident at *St. Andrews*, with two other inhabitants raised this action against the Respondents, the provost, magistrates and town council, and against the Respondents *James Bain* and others, the feuars, for declarator:

(First), that the said provost, magistrates, and town council hold and are vested in the property of that portion of the links of *St. Andrews* which lies to the east of the *Swilkin Burn*, subject to the burden and obligation of preserving the said links for the purposes of the game of golf, and for the recreation and amusement of the inhabitants of the said city; (second), that the said magistrates and town council have no right to encroach, or authorize or permit any encroachment upon the said links or any part thereof which shall have the effect of diminishing the space available for the said game of golf, or for the recreation and amusement of the said inhabitants; (third), that, in particular, the said magistrates and town council have no right to construct, or authorize or permit the construction by the other Defenders, or any of them, of a road for carts and carriages along the southern boundary of the said links, being the northern boundary of the several parcels of ground belonging to the other Defenders, and feued out to the said Defenders or their authors by the said magistrates and town council in and subsequent to the year 1820; and (fourth), that neither the said magistrates and town council nor the said others Defenders are entitled to use or authorize or permit the use of the portion of the said links adjoining the said northern boundary of the said parcels of ground as an access for carts and carriages to the said parcels of ground, or to the houses or premises of the said other Defenders built or situated upon the same: And the Defenders, and each of them, ought and should be interdicted, prohibited, and discharged, by decree foresaid, from constructing or authorizing the construction of the said road, and from using or authorizing the use of the said portion of the said links for the purpose of a cart or carriage access to the said parcels of ground and buildings or premises built or situated thereon, and from in any other way abridging the extent of the said links available for the said game of golf and for the recreation and amusement of the said inhabitants, and from interfering with the full and free use by the said inhabitants of the whole surface of the said links for the purposes foresaid in any manner of way.

Both Defenders lodged defences. The magistrates stated that the object of their appearance was to maintain their exclusive right to resolve and determine whether or not the road is to be allowed, upon due consideration by them of the public interest, and of the purpose of golfing and others for which the links are held by them.

The feuars contended that ever since time immemorial there had been use of the road for carts and carriages.

The pleas for the Appellants were:

(1.) The ground in question forming part of the links of *St. Andrews*, and being held by the Defenders, the magistrates and town council, subject to the obligation of preserving the same for purposes of recreation, and particularly for the purposes of the game of golf, the conversion of the said ground into a road for the purpose of affording a cart and carriage access to the said feus and buildings thereon is illegal, and in violation of the rights of the Pursuers and the other inhabitants of the city.

(2.) *Separatim*, and in any view, the construction of a road upon the said portion of the links, or the use of the said portion of the links for the purpose of a cart and carriage access, is illegal, as being a material interference with the due exercise by the Pursuers and others of their right of golfing over the said links.

(3.) The rights of the Pursuers and of the inhabitants of the city in and over the said links, and the said portion thereof, being as hereinbefore set forth, the Pursuers are entitled to decree in terms of the declaratory conclusions of the summons.

The pleas in law for the Respondents, the magistrates and town council, were:

(2.) The question of the formation of the road falls to be determined exclusively by the present Defenders in the exercise of their powers of administration and management.

(3.) The road in question being capable of being formed with advantage to the public, and without injury to the golfing and other rights over the links, the Pursuers' conclusions against the present Defenders are unfounded.

For the Respondents, *James Bain* and others, the pleas in law were:

(1.) The averments of the Pursuers are not relevant or sufficient to support any of the conclusions of the summons.

(2.) The Defenders are entitled to access to their properties by carts and carriages over the links (1) by virtue of prescriptive right, and (2), *separatim*, by the consent of the magistrates and town council, in the due exercise of their administrative rights over the said links, and decree of absolvitor should be pronounced accordingly.

(3.) The formation of a macadamized road by or with the consent of the magistrates and town council being lawful and *innocuæ utilitatis*, the action, in so far as relating thereto, cannot be maintained.

The Lord Ordinary allowed the parties a proof.

The Appellants led evidence of experienced golf players, some of whom were at first in favour of the road being made, to shew that it would interfere with the game of golf, at least when played near this portion of the links.

The Respondents, the town council, led evidence of a great

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many skilled golf players, who seemed to be of opinion that the road would be better than the present state of the track, and would not be any injury to the golfing, but rather an improvement.

The Respondents, the feuars, failed to prove that the track or road was used as a carriage access to their feus beyond the prescriptive period.

The Lord Ordinary on the 16th of July, 1879, found that the two first declaratory conclusions of the summons were unnecessary, and *quoad ultra* assoilzied the Defenders from the remaining conclusions of the action.

The Appellants presented a reclaiming note against this interlocutor to the Second Division of the Court of Session. On the 14th of November, 1879, the town council lodged a joint minute, No. 104 of process, with the Appellants to the effect that the town council craved leave to withdraw their defences; but on the 20th of November they lodged another minute withdrawing the minute 104 of process, and craved leave to appear in support of the judgment of the Lord Ordinary reclaimed against.

When the cause came on for hearing, the Defenders, the provost, magistrates, and town council, moved for leave to withdraw the joint minute, No. 104 of process; and after hearing parties by their counsel thereon, and on the merits of the cause, their Lordships of the Second Division pronounced the following interlocutor:

9th December, 1879. The Lords having heard counsel on the motion of the Pursuers to interpone authority to the joint minute, No. 104 of process, refuse the motion, in respect the Defenders, the provost, magistrates, and town council of *St. Andrews*, have, by minute, No. 106 of process, departed from the same; and having heard counsel on the reclaiming note for the Pursuers against Lord *Curriehill's* interlocutor of 16th July, 1879, adhere to the said interlocutor, but with the declaration that the said Defenders, the provost, magistrates, and town council of *St. Andrews*, have no right to alienate the *solum* of the ground in question, or the administration and control of the same, but are bound to retain the same in their own hands for behoof of the community of the burgh, and decern (1).

On appeal,

July 5, 12. Sir *F. Herschell*, S.G., and Mr. *Webster*, Q.C., maintained for the Appellants that the formation of the road in question was illegal and in violation of the trusts subject to which the links were held, diverting, as it would, a portion of the links from

(1) Court of Sess. Cas., 4th Series, vol. vii. p. 712.

their use as a recreation ground. Magistrates of a burgh are not entitled to alienate any part of an area of open ground like the links here, but must continue to hold it for the enjoyment of the community as defined by use and wont: *Sanderson* v. *Lees* (1); there the magistrates were interdicted from feuing a portion of the links, although they appeared to shew enough would still be left for the exercise of the privileges claimed. In the second place, the magistrates are not entitled to apply any part of such an area to a purpose unconnected with the kind of use which the community have hitherto enjoyed, even although the purpose be a public one, and although they propose to retain the property of the part so applied in their own hands: *Grahame* v. *Magistrates of Kirkcaldy* (2). There magistrates were interdicted from erecting some stables on a small bit of common which had been used for bleaching clothes, &c., although it was proved the ground had lain in a very neglected condition for a long time. A road might be justified if proved to have been constructed for the purpose of using and enjoying the links as recreation ground; but here the evidence plainly shewed that the road was intended for the advantage of private persons, the feuars, or for the convenience of traffic not connected with the use of the recreation ground as such. Both those purposes were inconsistent with the trusts for which the links are held.

The road was not required for the public; for only for the wants of the individual Respondents *Bain* and others, the proposed road would never have been heard of. And as to whether any public benefit will be served by the road, no witness for the Respondents had said that the formation of a cart and carriage road would be conducive to the interests of the main purpose for which the links are held, namely, golfing. All that is found is, that a made road would be better than the rough track cut up with ruts, but the question here was not between road and track, but between road and links. It was nowhere suggested in the answers for the town council that the road was to be temporary, in forty years the feuars might insist that the road could not be closed. And the road would, under the *General Police Act*, 1862 (25 & 26 Vict. c. 101), ss. 3 and 146–152, and the *Roads and Bridges*

(1) Court of Sess. Cas., 2nd Series, vol. xxii. p. 24.

(2) Court of Sess. Cas., 4th Series, vol. vi. p. 1066.

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Act, 1878 (41 & 42 Vict. c. 51), ss. 3, 47, and 123, incorporating sect. 96 of 1 & 2 Will. 4, c. 43, become one of the streets of *St. Andrews*, and pass into the property and administration of the police commissioners. And it followed that the declaration which the Court below had inserted in the interlocutor would not prevent the consequence of those statutes nor the growth of a right of servitude over this road.

[They also commented on *Adams* v. *Magistrates of Glasgow* (1), interim interdict from taking a portion of a public green for enlargement of a public street bounding the green; *Magistrates of Edinburgh* v. *Sir John Warrender* (2), right of owner of adjoining lands to pass from them on to the links; *Dyce* v. *Hay* (3), claim of right of recreation over private property; and *Cleghorn* v. *Dempster* (4), right of inhabitant to raise action for preservation of links.]

Mr. *Vary Campbell* (with him Mr. *Benjamin*, Q.C.) was proceeding to argue on behalf of the Respondents, the town council, when the Lord Chancellor stopped him, and requested him to confine his remarks to the proper form of the interlocutor of the 9th of December, 1879, and to the question of costs, the House being of opinion that the intention of the Court below was not completely conveyed by the language used in that interlocutor.

The *Solicitor-General for Scotland* (Mr. *J. B. Balfour*, Q.C.), (with him Mr. *Haldane*), for the Respondents *Bain* and others, maintained that there being nothing in their titles to prohibit them from building their houses facing the links, the case of the *Magistrates of Edinburgh* v. *Sir John Warrender* (2) applied. And all the Respondents, the feuars, wanted was that nothing should be put in the declaration to prejudice the question of their entry or exit from their houses.

As to costs, the feuars failed in the question of prescription; but they obtained judgment on another ground of their defence which continued to them the use of that which they desired, and therefore they ought to get costs.

(1) 40 Scot. Jur. 524; 5 Scot. Law Rep. 591.
(2) Court of Sess. Cas. 3rd Series, vol. i. p. 887.
(3) 1 Macq. at p. 307.
(4) Morr. 16,141; 2 Dow. 40.

Mr. *Webster*, Q.C., in reply:—

The Appellants appear here to uphold a public right; and in the answers for the Respondents there was not one word that the road was not to be dedicated perpetually to the public; with the declaration that no one can obtain a right over the road, it could scarcely be said that the Appellants had failed in this litigation.

The Law Peers delivered judgment as follows:—

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the object of this appeal, as it appears to me, has practically been to limit the power of the magistrates and town council of *St. Andrews* over the links of *St. Andrews* to a greater extent than that which has been thought necessary or right by the Court of Session. I take the material facts upon which the case is to depend as they are stated in the 3rd and 4th paragraphs of the answers for the provost, magistrates, and town council of *St. Andrews*, who admit that the links are held by them "as by their predecessors from time immemorial, for behoof of the inhabitants, and, *inter alia*, subject to the obligation of preserving the same for the purposes of the game of golf, and for the recreation and amusement of the inhabitants;" but that "with due regard to these purposes, and acting for the public interest, the present Defenders and their predecessors have always from time to time as occasion arose exercised powers of administration and management over the links now in question."

One of the acts which they say they have been accustomed to perform in the course of that administration and management is the letting of the pasturage and the regulation of bleaching clothes on the links; and another is the construction of a sloping walk or terrace, much insisted upon by the Pursuers, in conformity with the minute of council made in the year 1849; and, further, the levelling, filling up, and terracing of the ground to the south of the club house used by the golf club, in conformity with the minute of council of 1854. It appears by the evidence that these allegations are well founded, and the question arose whether, consistently with the admitted obligation on the one hand, and the exercise of the asserted and proved powers of administration

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and management on the other, a certain metalled or macadamized road, which the corporation think it expedient to make along the outside boundary of the links, where that boundary adjoins certain feus let off by them many years ago (which feus must be assumed to be no longer in point of law part of the links) should be made by them.

My Lords, as far as the question is one of titles, I collect that the admitted obligation is proved by ancient and immemorial use, rather than by any express trust limiting the right of property which the corporation have by their titles. I assume of course that this usage is sufficient to establish an obligation, which, indeed, is admitted, as I have said; but the titles, being in themselves general, it would follow that not only the power of administration and management, but also any usufructuary interest which may be consistent with the admitted obligation, would remain to the corporation under these titles; and that, as it appears to me, casts upon the Pursuers, who asked for an interdict to restrain the corporation either from making the road in question or from permitting any road to be used in that place for traffic by carts and carriages, the obligation of shewing that the making or permission of such a road or use would contravene the admitted or proved obligations. The first of those obligations is that of preserving the links, I take it, as far as necessary for this part of the case, for the purpose of the game of golf. With regard to that, my Lords, the state of the evidence is this. The direct, ordinary, and proper course of the game of golf is not over the ground which would be occupied by the *solum* of this road, although in the course of the play, balls may be struck from time to time so as to pass over or to lie upon this part of the ground, and in that sense it is not excluded from the golf course. But it is outside the course proper, and it would rather be a deviation from the course of the play, whether intentional or not I do not enter into, it would rather be by deviation than otherwise, that the game might have to any extent to be actually played over this particular piece of ground. In that state of things there can be no better evidence to rely upon as to whether this alteration of the surface, and this permission of the use of carts and carriages, will substantially interfere with the obligation

of preserving the ground for the purposes of the game of golf, than the consentient evidence of those witnesses who are most skilled in and best understand the game. Of such witnesses we have had the evidence before us of a very considerable number, and the general result of their evidence is, that the making of the road will certainly not interfere with the due prosecution of the game, and that such variation in the state of the ground as it would introduce, would, in the event of balls finding their way there, rather add to than detract from the interest of the game—giving fresh opportunities for skill rather than the contrary.

My Lords, that is the consentient evidence, and I cannot but observe that, regarding the matter from that point of view, it does not seem to me to be probable that this interference with the ground for the purpose of golf would be more prejudicial or make a substantially greater difference than the acts which are admitted to have taken place upon former occasions, which were to some extent rather impressed into their service by the Appellants; because that construction of the sloping walk or terrace instead of the rough ground with many holes in it, which took place under the presidency of Sir *Hugh Lyon Playfair*, in or after 1849, was at least as material an alteration as this can be; and the object with which that was done, when seats and barriers were placed for the accommodation of spectators, attracting a large number of people, would be at least as likely to interfere in some degree with the course of the game as the occasional traffic backwards and forwards over a macadamized road would be.

So far therefore as the obligation of preserving the ground for the purpose of the game of golf is concerned, I come to the same conclusion as that at which the Court of Session arrived, namely, that there is no substantial interference with that obligation, and that the road may be reconciled with its due observance.

Then, with regard to the recreation and the amusement of the inhabitants, it appears to me that convenient means of access, not interfering with the use of the ground for any necessary purposes of the game, are rather in aid of the recreation and amusement of the inhabitants than the contrary; nor can I admit that it makes in that respect any difference, if the fact be, as I have no doubt it is, that there are some particular inhabitants, namely the

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feuars, having houses upon the ground adjoining the road, to whom the making of this road would be in a special degree convenient. Therefore, my Lords, I agree substantially with the view which was laid down both by the Lord Ordinary, and unanimously by the Second Division of the Court of Session; but the question that remains is this, whether the manner in which the Second Division thought it right to guard their decision, so far in favour of the Defenders, is sufficient for the purpose.

Now, as I understand the view of the Second Division, they were clearly of opinion that it would be contrary to the admitted obligations of the corporation for them to alienate any part of the *solum* of the ground in question, or to abdicate the administration and control of it, and so far they have expressed their intention on the face of the words which they introduced into the interlocutor of the 9th of December, 1879. But I collect further, and I also think it follows from the principle which guided them upon that point, that they thought it would be inconsistent with the obligation under which the corporation lay, either to grant private easements, rights of way, or others, over this ground to particular individuals, or, which is a larger operation of the same kind, having made this road, to dedicate it to the public and so create a public easement; to that extent abdicating their existing power of administration and control.

Now, my Lords, that appears to me to be a matter of considerable importance, and in my judgment it goes some way to justify the present appeal; because, in the absence of words which would make that clear, and make it further clear that it is not only inconsistent with the duty of the corporation to grant such rights, but also part of their duty to prevent their being acquired from any neglect on their part; taking that view, I am bound to say that I think the interlocutor, as it stands, did not give to the public of *St. Andrews* (here represented by the present Pursuers, the Appellants,) that amount of protection and security which was necessary to give effect to the opinion of the Court, as far as it was in their favour.

Taking that view, your Lordships have considered what variation of the interlocutor would be proper for the purpose of completely securing that object; and I propose to your Lordships to

vary the interlocutor of the 9th of December, 1879, by omitting from the declaration therein contained the words, "but are bound to retain the same in their own hands for behoof of the community of the burgh," and substituting the words "but are bound to retain the portion of the links in question in their own hands for behoof of the community of the burgh, so that any road which may be formed thereon shall remain in all time coming a portion of the said links, held in the same way, subject to the same uses, and for the same purposes as any other portion of the said links; and that the said provost, magistrates, and town council are bound to take such steps as may be requisite to prevent either the police commissioners of *St. Andrews* or any other person from acquiring any title thereto, or any right to interfere therewith, so that it may always be in the power of the said provost, magistrates, and town council to take away or alter such road, and in the meantime to restrict and regulate the traffic thereon."

My Lords, it was suggested by the learned counsel for the Respondents, the provost and magistrates, that there should be words introduced to prevent any encouragement being held out, by the form of the declaration which your Lordships proposed to introduce, to anything like a capricious or arbitrary exercise of their powers. My Lords, I cannot see that there would be any such encouragement; and, on the other hand, any words which might be introduced for the purpose of discouraging any particular exercise of the powers could hardly be reconciled with the opinion which your Lordships entertain, that it is necessary for the provost, magistrates, and town council to retain in that respect their whole legal power, unimpaired and unprejudiced by any present exercise of their discretion.

Nothing now remains but to consider the question of costs. Upon that point, I am bound to say that I think it is right for your Lordships to bear in mind, not only the fact that the alteration now proposed to be made in the interlocutor of the 9th of December, 1879, was wanted to give complete security to the Appellants and the interests which they represent, but also that before the action was brought the attitude of both sets of Respondents was such as in my opinion to justify, I do not say the form of the action, but the institution of some action for the purpose of

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obtaining from the Court such declarations as will now have been obtained. It is evident to me that the provost, magistrates, and town council of *St. Andrews*, in what had previously passed, had been acting upon an assumption of their having larger powers than those which the Court of Session, and your Lordships' House, have recognised—powers, that is to say, whether upon a bargain with the individual feuars, or otherwise, to dedicate to the public this particular part of the ground for the purpose of a public highway. That power, however, your Lordships think they have not; and it does appear to me that their whole proceedings, down to the time when the action was brought, were not only such as to justify the Pursuers in thinking that they claimed and might exercise that power, but such as necessarily to justify your Lordships in the conclusion that they did intend to assert that power—that they had intended the use of it, and might revert to that intention afterwards—and even in their pleadings in this action I fail to perceive anything like a renunciation of that power. Under these circumstances, it seems to me that the manner in which the Court below has dealt with the costs is at least sufficiently favourable to the Respondents, and that the costs of this appeal ought not to be thrown upon the Appellants; though on the other hand I do not propose that they should be given the other way.

As to the costs, therefore, what I should propose is, that the variation which I have read being made, there should be no costs of this appeal.

LORD BLACKBURN:—

My Lords, I have come to the same conclusion as that stated by my noble and learned friend. The provost, magistrates, and town council of *St. Andrews* hold as part of the common good of the town, a portion of the links. They once had a much more extensive estate, but like a great many other municipal corporations in *Scotland*, they have got rid of a great part of their landed property: still they do hold a portion of the links, some ten acres or so, in their own possession. Their title deeds do not place any restriction upon the manner in which they are to hold them, but I take it to be the established law of *Scotland* that a municipal corporation may hold lands subject to an obligation to allow the

inhabitants such use as use and wont over a prescriptive period have established that the inhabitants of the town are entitled to. I do not by any means think that this is an incident attached to the fact that the estate is held by the corporation as part of its common good. In old days, when corporations had extensive estates, there were many portions of estates treated like any ordinary gentleman's estate, in which no one could dream there was any such right as a right to be established by prescriptive usage.

In the present case there is no controversy about it at all. It is admitted that the municipal corporation of *St. Andrews* do in fact hold the lands subject to the rights of the inhabitants of *St. Andrews* to use them, for golf principally, and for other objects of recreation; and I think that in modern times it is not going at all too far to say, as the Judges have done, that that is the primary and principal object for which they are held. Still subject to that primary and principal object, the municipal corporation has held the lands with the right to make any use, or, to quote from the words of Lord *Gifford*, "to do anything which does not destroy or injure the primary purposes for which the land is held, namely, its public enjoyment for golfing or otherwise." They have the right to do anything that does not injure or interfere with those primary purposes — they have not the right to do anything which does interfere with those primary purposes.

Now the summons here asks (I pass over the two first conclusions which are merely general statement) to have it declared that "the magistrates and town council have no right to encroach, or authorize, or permit any encroachment upon the said links or any part thereof which shall have the effect of diminishing the space available for the said game of golf, or for the recreation and amusement of the said inhabitants; (Third) that, in particular, the said magistrates and town council have no right to construct, or authorize, or permit the construction by the other Defenders, or any of them, of a road for carts and carriages along the southern boundary of the said links;" "and (fourth) that neither the said magistrates and town council nor the said other Defenders are entitled to use, or authorize, or permit the use of the portion of

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the said links adjoining the said northern boundary of the said parcels of ground as an access for carts and carriages."

Now the proposition put forward in the third and fourth, that those two purposes are under all circumstances, and in every way, beyond the power of the provost, the magistrates, and the town council, I think it is perfectly plain is too wide a proposition a great deal. Such things may be done in such a way as to interfere with the primary purposes for which the lands are held, namely, golfing and recreation, in which case I agree that they should not be done. On the other hand such things may be done in such a way as not to interfere with this use, and though the motive may be a wish to give an advantage to a particular person who owns a house, or any other particular motive they like, yet so long as it does not injure or interfere with the rights which the inhabitants possess to have those lands preserved for the public recreation and enjoyment, more particularly for the game of golf, I do not see that the Appellants have any right to complain or to claim any interdict.

Now it is upon that that the principal questions arise afterwards. The summons obviously claims too much; and I think, when the evidence is gone into, it will be seen that the making of such a road, that is to say, so far as macadamising the road and allowing carts and carriages to travel along it are concerned, would clearly not to that extent interfere with the game of golf at all; nor do I think it would interfere with the *jus spaciendi*. You cannot put a precise limit to it—it must depend a good deal upon the discretion of those who have the management of it; but even as regards allowing carts and carriages to carry traffic to houses alongside of it, I do not see that that would necessarily interfere with the enjoyment of the ground.

I can quite imagine there might come a change in course of time: if the town of *St. Andrews* were to grow as great as the town of *London*, and if a traffic were to go along that road as heavy and as great as the traffic which now goes along the *Strand*, I can imagine that then it would interfere with the enjoyment of the links; but that is a remote contingency not particularly likely to happen. At the present time, as things exist, the making of the road and throwing it open to be used by

the inhabitants for the time being would not be a matter that would necessarily interfere with the primary purpose for which the magistrates hold the land.

Now we come to the purpose which I think really was the more important purpose, though it was not very clearly kept in view by those who brought the summons and instituted the action originally. It does appear, I think (more from a confused notion about what their rights and powers were than from any intention to do wrong in any way), to have been the notion entertained by the town council in 1874 or 1875, that they had the power under certain circumstances to make, or allow another person to make the road and sell it to the feuars, or give them the right to use it in future—to part with their rights so that they would no longer have control over it at all. If they did that, I certainly think that, whether at the present moment it would interfere with the public right of recreation or not, it is very likely that it would in time injure it. I think the Court below has very properly said, that, that being so, they should express themselves in their verbal judgment in such a way as to make it clear that the provost and town council should not do it, and that there should be some terms put into their interlocutor (that being the way in which they thought it would be best done), to secure that the provost and town council if they made this road, though they might allow traffic to go on it, were still to preserve the full control over it, and to hold it subject to all the rights which the inhabitants possess for recreation, not in particular but in general; and that the provost and town council should keep to themselves the power of regulating the traffic, so as to keep the road whilst the traffic went on it in such a state as that it should not be a nuisance to those in pursuit of recreation. I can perfectly understand that they might make an order that carts carrying manure, for example, should not go along the road from one place to another, or possibly, that the more offensive descriptions of traffic generally should only be driven through it by night, and otherwise, as to many of the numerous purposes as to which bye-laws might properly enough be made; but they must preserve their powers and must take care that they do not part with the road so that anybody else

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acquires a right paramount to the corporation. I think that object is very clearly expressed in the verbal declarations, but when it came to be put into the interlocutor it was not so fully expressed; consequently, I think there was very considerable reason to doubt whether there might not be future litigation arising upon the subject of what was decided and what was meant. Upon that ground I think it most desirable to alter the declaration in such a way as to make it perfectly clear in future what are the limits of the powers of the provost and town council of *St. Andrews*, in respect of these links, and also to make it clear that the right of the inhabitants to object to their control is limited to the right to object to their doing something which would interfere with or injure the primary purposes for which the lands are held, namely the enjoyment of the inhabitants.

Now, the only other question which arises is the question of costs. The general rule of your Lordships' House is that if the appeal be dismissed it should be dismissed with costs, but when it appears from the result of the appeal upon some subordinate or, it may be, substantial part of the case that the Appellants were justified in coming to this House, then it is generally said that although the costs go to the victor, in that case as in this, there would be no thorough victory to either side; and therefore the question would be as regards the costs, how far that would apply to the present case. It is never very easy to be quite clear about such a point as this, but, I think, the interlocutor being varied as proposed, there is a sufficiently important object attained by the Appellants in coming here to make it proper to say that the Appellants should not pay the costs of the appeal, though it is not quite clear whether they should be entirely absolved. In every other respect I agree with the motion which has been made by the noble and learned Lord on the woolsack.

LORD WATSON:—

The only questions which have been argued at your Lordships' Bar relate to the powers of the magistrates and town council of *St. Andrews* as proprietors and administrators of that part of the common good of the burgh, which consists of the eastern

portion of the links. *Primâ facie* the common good of a burgh, vested in the magistrates generally under very ancient titles, is property which they can dispose of as freely, so long as they keep the interests of the burgh in view, as a private proprietor can deal with his own land. But in this case the part of the common good in question is subject to a special trust for behoof of the community, or in other words the inhabitants and burgesses of the burgh of *St. Andrews*. That right in the burgesses does not require to be constituted by writing—it can be constituted and generally is constituted by immemorial usage; that is to say, by a course of enjoyment for a prescriptive period of at least forty years. In the present case there are abundant indications that the inhabitants did possess that right at a somewhat distant period; but your Lordships are saved from making any inquiry into that question, which is one of fact merely, by the judicial admission given by the magistrates to the effect that they do hold that part of their property under trust to preserve it for the game of golf and the recreation of the inhabitants.

Now, my Lords, although they hold it subject to these rights on the part of the inhabitants, the magistrates and council remain undivested to any further extent of their proprietary rights, and are therefore entitled either to make or to sanction any other uses to which the property is convertible so long as those uses are not inconsistent with the due enjoyment by the burgesses of the rights vested in them by law. What uses they may so sanction will depend to a very great extent upon the amount of population and the amount of the golf played or recreation taken. Uses which would be perfectly legitimate and proper in a thinly populated burgh may become very illegitimate and very improper, and may constitute invasions of the burgesses' rights, when practised where there is a large population.

My Lords, what the magistrates and town council were proposing to do at the time when this action was raised appears to me to have been this, they were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to preserve for purposes consistent with the rights of the

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inhabitants; and they justified their position upon the ground that as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time.

The Appellants brought this action no doubt with a view to stop the threatened proceedings, but they did not limit the conclusions of their summons to the actual proceedings which the council were threatening to take, but made them so wide that, if given effect to, they would establish this proposition, that wherever a right of golfing or of recreation exists the magistrates cannot give a comfortable or convenient right of passage over the ground reserved for that purpose, although the so giving it may not interfere to the smallest extent with the rights of the burgesses. On the other hand, the defence set up in this case appears to me to amount on the part of the magistrates and council to a justification of that which they proposed to do as falling within their discretion; and beyond that a separate defence was set up by the feuars to which I shall not refer, because it has not been insisted upon at your Lordships' Bar.

My Lords, I am of opinion with your Lordships that the Court of Session were quite right in holding that the Appellants have failed to shew that the present use of a metalled road along the line proposed will have the slightest effect in interfering with the privileges of the golfing community. The evidence upon that point appears to me to be all one way. There is undoubtedly a proper golf course outside of which this line of road is, and that must not be interfered with; but no one proposes to interfere with it. Then it is said that you must leave untouched everything outside of that course which can be shewn to be a part of the links to which a ball may be driven in playing the game of golf. I entirely demur to that proposition. The contention to which I am prepared to give effect really comes to this, that whatever is outside of the proper golfing course may be turned to various purposes so long as these are not inconsistent with the

game of golf: and really the speculation as to whether it is better to have a road with ruts in it, or a metalled road, or a piece of rough grass with hollows and heaps, is after all rather a matter of fancy than a question having any substance in it.

That being so, my Lords, the case is narrowed to the question of regulation. I do not think much is made of that question on the record, and still less is made of it in the evidence. I see nothing which can suggest to me that the present use of that road by vehicles as well as by pedestrians will in the least degree encroach upon the privileges which the community are entitled to exercise. It may very well be that upon special occasions it will be necessary for the magistrates to exercise some right of regulation over the traffic. There are kinds of traffic which are mentioned in the evidence, such as carting coals and so on, which do not seem very consistent with recreation; but it is obvious that these might be regulated so as not to interfere with the use of the ground by the inhabitants at those times of the day when, ordinarily, people are in the habit of taking their recreation. And then it is a possible thing that some day or other, as has been suggested by my noble and learned friend opposite, such a change may come over *St. Andrews* that it may become necessary in the due exercise of their administrative powers for the town council to take away this right of road. One cannot anticipate that such a thing will immediately occur, but it may, and those who have the right to take recreation, and to play golf upon the links, are quite entitled to have a judgment which will prevent the magistrates from making such an alienation at the present moment as may come at any future period into collision with their rights over this piece of land, which undoubtedly are of primary importance.

I therefore entirely approve of the declaration which has been proposed by my noble and learned friend on the woolsack, because it appears to me to settle as definitely as a Court can do by anticipation, the limits within which the discretion of the magistrates must be exercised, and it lays upon them the imperative duty which they were at the time this action was raised about to neglect; the duty not only of abstaining from doing any act or deed by which a right would be created in others, but of taking

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steps to prevent others from acquiring such right. Upon the matter of costs I entirely agree with my noble and learned friend upon the woolsack.

JUDGMENT:—*Ordered and adjudged* that the said interlocutor of the Lords of Session in *Scotland*, of the Second Division, of the 9th of December, 1879, complained of in the said appeal, be, and the same is hereby varied, by omitting from the declaration therein contained the words, "but are bound to retain the same in their own hands for behoof of the community of the burgh," and substituting the words, "but are bound to retain the portion of the links in question in their own hands for behoof of the community of the burgh, so that any road which may be formed thereon shall remain in all time coming a portion of the said links, held in the same way, subject to the same uses, and for the same purposes, as any other portion of the said links; and that the said provost, magistrates, and town council are bound to take such steps as may be requisite to prevent either the police commissioners of *St. Andrews*, or any other person, from acquiring any title thereto, or any right to interfere therewith, so that it may always be in the power of the said provost, magistrates, and town council to take away or alter such road, and in the meantime to restrict and regulate the traffic thereon:" and it is further *ordered and adjudged*, that in other respects the said interlocutors complained of in the said appeal be, and the same are hereby affirmed: and it is further *ordered*, that the cause be, and the same is hereby remitted back to the Court of Session in *Scotland*, to do therein as shall be just and consistent with this variation and judgment.

Lords' Journals, 12th July, 1881.

Agents for Appellants: *Simson & Wakeford.*
Agents for Respondents: *Connell, Hope, & Spens.*

[HOUSE OF LORDS.]

FRASER or ROBINSON . . . . . APPELLANT; H. L. (Sc.)
MURDOCH . . . . . RESPONDENT. 1881
Aug. 3.

Trust—Legacies—Severance of Funds for Investment for Behoof of Distinct Parties—Indemnity of Trustees for Liability incurred.

A testatrix directed her trustees to pay the interest or annual rent of £2000 to Mrs. *A.* during her life and after her death to divide that sum among her children; and to pay the interest or annual rent of a similar amount to Mrs. *B.* in life-rent, with the fee to her children.

The trustees were empowered by the deed to realize, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, "should they consider it advisable or expedient to do so without any personal responsibility for loss, if any, thereby sustained;" with power also "to lend or place out on such securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively, the securities to be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise."

The testatrix at her death held £850 stock of an unlimited bank. The trustees, at the desire of Mrs. *A.* and without consulting Mrs. *B.*, set £200 of this stock aside as part of the fund appropriated to Mrs. *A.*, and realized the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of £2000, and that they had paid the residue, received their discharge from Mrs. *A.* and Mrs. *B.* Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. *A.* and Mrs. *B.* All the investments stood in the names of the testatrix's trustees.

The bank became insolvent, and calls were made upon the trustees in respect of the £200 stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. Mrs. *B.* objected to any portion of her legacy being taken:—

Held, reversing the decision of the Court below, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. *B.* and her family for liabilities incurred on those allotted to Mrs. *A.* and her family.

Ex parte Garland (10 Ves. Jun. 110) followed.

APPEAL from the Second Division of the Court of Session, *Scotland.*

Survived by one son, *James Fraser Robb*, and two daughters, Mrs. *Sinclair* and Mrs. *Robinson* (the Appellant), both widows with

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families, Mrs. *Elizabeth Fraser* died on the 11th of January, 1876, leaving a trust disposition and settlement, dated the 7th of October, 1870. Of the trustees mentioned in the trust deed the son, *James Fraser Robb*, and the Respondent, Mr. *William Murdoch*, only accepted the trust.

By the trust disposition the testatrix granted to her trustees in trust all her estate, except the lands of *Thorax*, which were by a previous deed settled on her son, for the following purposes:—

First: To pay all her just and lawful debts and expenses.

Secondly: To make payment to Mrs. *Sinclair* "of the interest or annual rent of £2000 sterling payable at the term of Whitsunday yearly, beginning the first payment thereof at the first term of Whitsunday which shall happen after the expiry of one year from the date of my decease, and so forth yearly during the life of the said" Mrs. *Sinclair*. And after her decease "my trustees shall be bound and obliged to make payment to her child or children of the foresaid sum of £2000"

Thirdly: A precisely similar trust as to £2000 in favour of Mrs. *Robinson*, the Appellant, and her children in fee.

Fourthly: Four legacies of £5 to the four trustees named.

And lastly:

That my trustees shall, after payment of my debts, deathbed and funeral expenses, and the expenses of this trust, and making provision for payment of the legacies above mentioned, divide the free residue and remainder of my said heritable and moveable means and estate (excepting always the said town and lands of *Thorax* and others) equally between and among the said *James Fraser Robb*, *Margaret Fraser* or *Sinclair*, and *Elizabeth Fraser* or *Robinson*, share and share alike; with full power to my trustees to enter into possession of the said trust estate and effects, to call and sue for, uplift and receive the rents, mails, and duties, interests and annual profits of the same, and to grant discharges therefor, which shall be as valid and effectual to the receivers as if granted by myself; as also to sell and dispose of all or any part of the said trust estate and effects, and that either by public roup or private bargain, as my trustees shall consider most proper; and to execute all and whatever deed or deeds, containing all necessary clauses for rendering the said sale or sales effectual, in the same manner and as amply as I could have done myself; with power also to my trustees to continue to hold any or all of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained: With power also to my trustees to lend or place out on such security or securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively, the said security or securities to be conceived in favour of my trustees, and that

for the purposes of this trust and no otherwise; as also to vary such security or securities in or upon which they shall have lent or placed out the moneys coming into their hands in virtue of the present trust for other security or securities of the like nature, when and so often as it shall seem to them expedient: With power also to my trustees to appoint either one of their own number or any other person, with or without caution, to be their factor, agent, or cashier, for uplifting, discharging, and conveying the funds of the trust hereby created and the securities held by them for the same, and for applying the same for the purposes of the trust, and to give a reasonable allowance to such factor, agent, or cashier for his trouble: And further, with power to my trustees hereby appointed or to be appointed in pursuance hereof from time to time to nominate and appoint any person or persons to be a trustee or trustees along with them, or in place of any trustee or trustees who shall die or desire to be discharged, or refuse, decline, or become incapable to act in this trust; and when and so often as any new trustee or trustees shall be so nominated and appointed, all the trust estate and effects, heritable and moveable, real and personal, shall forthwith be disponed and assigned in such form as the same shall be vested in such new trustee or trustees jointly with the continuing trustee or trustees, or solely with the new trustee or trustees in case of there being no continuing trustee, and that for the purposes of this trust and no otherwise: Declaring always that my trustees shall not be liable for omissions or neglect of management, nor *singuli in solidum*, but each one for his own acts, receipts, or intromissions only, nor shall they or any of them be liable, answerable, or accountable for any banker, factor, or other person, with whom or in whose hands any of the trust funds may come to be deposited in the execution hereof, nor for the insufficiency or deficiency of any funds or securities in or upon which any of the trust funds may be invested in pursuance of and conformity to this settlement, or for any other misfortune, loss, or damage, which may happen in the execution of this trust or otherwise in relation hereto unless the same shall happen by or through their own wilful defaults respectively.

The trust estate which fell under the trustees' management was £5333, composed chiefly of railway preference stocks, but it included £850 Consolidated Stock of the *City of Glasgow Bank*, an unlimited company. The trustees having cleared off the liabilities of the trust and paid the smaller legacies, proceeded to make arrangements for setting aside funds to meet the investments of the two legacies of £2000. They did this by partly retaining existing investments and partly by purchasing new ones. As to the stock of the *City of Glasgow Bank* some correspondence passed between *James Fraser Robb*, one of the trustees, and his sister, Mrs. *Sinclair*, and the other trustee, Mr. *Murdoch*. In a letter dated the 28th of November, 1876, Mr. *Murdoch's* firm wrote as follows to Mrs. *Sinclair*:

Dear Mrs. *Sinclair*,—We had a letter a few days ago from Mr. *Fraser Robb*, in which he stated that he had written to you to see whether you would care to take £1000 worth of the *City of Glasgow Bank* Stock as part of the money to be

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invested for your behoof by the trustees under Mrs. *Fraser's* will. We are anxious to have the matter of the investments concluded prior to Mr. *Fraser Robb's* leaving the country, as he proposes to do next month, and shall be glad to learn your views on that subject. We may mention that our brokers recommended that this stock should be realized, and our own view is that bank stock is not a suitable class of stock for trustees to hold.

To this Mrs. *Sinclair* replied on the 30th of November, 1876:

Dear Mr. *Murdoch*,—I am in receipt of yours of the 28th, and beg to say in reply that I would be unwilling to risk so large a sum as £1000 in the purchase of stock of the *City of Glasgow Bank*; but, with the consent of the trustees, I would willingly invest £500, and that on my own responsibility. . . .

Accordingly the trustees retained £200 of the *Glasgow Bank* Stock, and realized the remaining £650. In their communications with the Appellant, who resided in *Australia*, they do not seem to have informed her that they intended to retain any portion of this stock until she received the discharge mentioned below.

The trustees having arranged for the investments towards the two specific legacies of £2000, proceeded to deal with the residue of the estate. The share of residue falling to the Appellant was £382 14*s.* 1*d.*; of this the trustees retained £124 15*s.* to be invested on her account in order to meet any depreciation which might occur when the investments were realized. They retained a similar sum for the like purpose out of Mrs. *Sinclair's* share of residue. The trustees next prepared a discharge granted to the trustees by Mrs. *Fraser's* three children. This discharge, dated the 22nd of March and 31st of May, 1877, after narrating the trust disposition, the assumption of new trustees, proceeded as follows:

And, further, considering that the said *James Fraser Robb*, *William Murdoch*, *Robert Fraser Robb Sinclair*, and *Andrew Macpherson*, trustees, original and assumed as hereinbefore mentioned, having realized so far as necessary the means and estate of the said Mrs. *Elizabeth Robb* or *Fraser*, paid the debts, deathbed and funeral expenses, and the expense of executing the said trust, and the legacies of £5 to each of the said *James Fraser Robb*, *James Morison*, and *William Murdoch*, have invested the foresaid sum of £2000 mentioned in the second purpose of the said trust disposition and deed of settlement (under deduction of the sum of £20, being the legacy duty thereon), in the following stocks: viz., £200 of the *City of Glasgow Bank* Stock, £1025 Consolidated Preference Stock No. 2 of the *Caledonian Railway Company*, £300 Guaranteed Stock of the said *Caledonian Railway Company*, £100 *Monkland* Preference Stock (Ordinary) of the *North British Railway Company*, and £60 2*s.* 6*d.* Consolidated Preference Stock No. 1 of the said *North British Railway Company*, and have invested the

foresaid sum of £2000 mentioned in the third purpose of the said trust disposition and deed of settlement (under deduction of the sum of £20 as aforesaid), in the following stocks :—viz. £1225 Consolidated Preference Stock No. 2 of the said *Caledonian Railway Company*, £300 Guaranteed Stock of the said *Caledonian Railway Company*, £100 *Monkland* Preference Stock (Ordinary) of the said *North British Railway Company*, and £315 17*s.* 6*d.* Consolidated Preference Stock No. 1 of the said *North British Railway Company*; and that the said trustees have exhibited to us accounts of their intromissions with the estate and effects of the said deceased Mrs. *Elizabeth Robb* or *Fraser*, shewing that after payment of the said debts, expenses, and legacies, and providing for the investment of the said sums of £2000 (under deduction as aforesaid), and the interest or annual rent due at the term of Whitsunday, 1877, to the said Mrs. *Margaret Fraser* or *Sinclair*, and Mrs. *Elizabeth Fraser* or *Robinson*, there remains in the hands of the said trustees a free residue of £1148 2*s.* 3*d.*, giving to each of us the said residuary legatees the sum of £382 14*s.* 1*d.*: And further, considering that it has been agreed between us, the said Mrs. *Margaret Fraser* or *Sinclair*, and Mrs. *Elizabeth Fraser* or *Robinson*, and the said trustees, that the sum of £124 15*s.* should be retained by the said trustees from the residue falling to each of us as aforesaid, to meet any depreciation that may arise on the stocks in which the said sums of £2000 (under deduction as aforesaid) have been invested as hereinbefore mentioned, and as a security to the said trustees against any loss that might thereby be incurred by them; and that the said sums of £124 15*s.*, retained as aforesaid, should be invested in the names of the said trustees, and the interest or dividends accruing thereon paid to us, along with the interest or dividends on the foresaid sums of £2000 (under deduction as aforesaid); that the said trustees should be bound to account to us, our executors or representatives, for the said sums so retained. . . .

The deed continued, considering that in terms of the aforesaid agreement, the trustees had in each case invested the said sum of £124 15*s.* 1*d.*. in that amount of Consolidated Preference Stock No. 1 of the said *North British Railway*, of which investment Mrs. *Sinclair* and Mrs. *Robinson* approved: and that the balance of residue had been paid to them, they thereby acknowledged the receipt of that sum and discharged the trustees; and acquit and simpliciter discharge the said trustees acting under the said trust disposition of the whole actings, transactions, intromissions, and management had by them with the means and estate of the said Mrs. *Elizabeth Robb* or *Fraser*.

The trustees half-yearly rendered to the Appellant statements and accounts of the investments which were held by them for her behoof and of interest falling due thereon. Similar statements and accounts, including the *City of Glasgow Bank* Stock, were rendered to Mrs. *Sinclair*, to whom the dividends on that stock were

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regularly paid. All the investments stood in the names of Mrs. *Fraser's* trustees.

In October, 1878, the *City of Glasgow Bank* became insolvent; and in the liquidation which followed *James Fraser Robb* and the Respondent *William Murdoch* were placed on the list of contributories in respect of the £200 stock which stood in their names as Mrs. *Fraser's* trustees, and calls amounting in the aggregate to £5500 were made upon them. The trustees proposed to pay the calls out of the investments appropriated to the Appellant, Mrs. *Robinson*, as well as out of those allotted to Mrs. *Sinclair*. The Appellant, to prevent the trustees so applying stocks appropriated to her legacy, raised this action by a note of suspension and interdict.

The action, which was directed against Mrs. *Fraser's* trustees, was resisted only by the nominal Respondent, *William Murdoch*, who had entered into a compromise with the liquidators, and had assigned to them all right of relief competent to him against the trust estate.

No proof was led, but the parties by a joint minute agreed, *inter alia*, that the Court should be entitled to draw all inference both of fact and law from the terms and contents of the letters and documents produced which were held as genuine.

The pleas in law of the Appellant were *inter alia*:

(2) Two separate and distinct trust estates having been created as applicable to the complainer and Mrs. *Sinclair* respectively, the Respondents are not entitled to burden the complainer's estate with losses sustained through the investments made for Mrs. *Sinclair's* trust estate and behoof. (3.) In any view, the trustees having made separate and distinct investments, the one set applicable to Mrs. *Sinclair*, and the other to the complainer, there was thereby, and by the correspondence which preceded and the actings of parties which followed, an arrangement constituted whereby the risk of the investments made on behalf of Mrs. *Sinclair* was left with her, and her share of the trust funds in the trustees' hands, and in no respect with the complainer or her investments. (4.) The Respondents are barred, by the arrangements entered with Mrs. *Sinclair* condescended on, from claiming relief against the complainer or the investments made for her behoof.

The material pleas in law for the Respondent were:

(2.) The trustees having acted within their powers in continuing to hold the bank stock, are entitled to be indemnified out of the trust estate in their hands for any loss incurred or to be incurred by them in consequence of holding the said

stock. (3.) The investments of the trust funds having all along stood in the names of the trustees as such, and the trust being one and indivisible, the trustees' lien or right of indemnity subsists, and extends over the whole trust estate. (4.) The trustees not having by their actings, or by acceptance of the discharge founded on, or in any other way, renounced or restricted their said right of indemnity as against the complainer, the *interim* interdict should be recalled, and the reasons of suspension repelled, with expenses.

The Lord Ordinary (1) on the 6th of January, 1880, gave judgment in favour of the Appellant, and granted the interdict as prayed for; but the Second Division, on the 10th of March, 1880, consisting of three Judges, recalled (Lord *Gifford* dissenting) the Lord Ordinary's interlocutor, and repelled the reasons of suspension, and refused the interdict (2).

June 21, 23. *The Solicitor-General for Scotland* (Mr. *J. B. Balfour*, Q.C.), and Mr. *Moncreiff*, maintained for the Appellant, that under the terms of the trust deed it was *ultrà vires* of the trustees to retain bank stock as an investment of the specific legacies.

It was not in the exercise of the powers conferred by the trust deed, but under a special arrangement with Mrs. *Sinclair* and on her responsibility, and contrary to their own judgment, and without the knowledge of the Appellant, that this stock was retained, therefore the trustees were barred by their own actings from claiming relief against the Appellant's estate.

The power given to continue to hold the stocks was a power only to do so during the administration of the trust funds until appropriated; or alternatively, a power to retain them in appropriation. The deed gave a power to sever the trust funds, and they submitted the trustees had done so, and had represented to each lady that a separate investment was made for each, and that interest was held on certain specified stock for their behoof; and therefore the legacies forming two distinct and separate trust estates, the one was not liable for the loss resulting from the other. At all events the trustees were not entitled to relief against the £125 retained out of the residue, which was kept by them solely to meet possible depreciations on the investments made for the Appellant.

(1) Lord *Rutherfurd Clark*.
(2) Court Sess. Cas. 4th Series, vol. vii. p. 694.

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[They cited *Brownlie* v. *Brownlie* (1); *Ballard* v. *Marsden* (2).]

Mr. *Chitty*, Q.C., and Mr. *C. J. Pearson* (with them Mr. *Benjamin*, Q.C.), contended for the Respondent, that on a true construction of the deed the trustees were justified in retaining the *City of Glasgow Bank* stock. They were empowered to hold all or any of the stocks, and this power was peculiarly appropriate to that portion of the testatrix's estate which was to be held to meet the legacies. The trustees obtained a transfer of the existing investments into their own names as the trustees under Mrs. *Fraser's* trust disposition, and continued to hold them in pursuance of the power enabling them to do so and in reliance on the express clause as to indemnity.

It was not shewn that the trustees surrendered their discretion, or acted against their better judgment, if the discretion or power was exercised within the powers, and *bonâ fide* fault could not be found with them, nor could their power to hold the stock without consulting either beneficiary be demitted by their consulting one of them. There was no power to appropriate, nor was it correct to say the legacy funds were severed into two. Statements were rendered to both ladies, which shewed certain funds were held as producing the respective income, only as a matter of convenience and purely provisional as a matter of book-keeping; but there never was any real or actual separation. The funds remained vested as before, in the trustees' names, as trustees of the testatrix.

The deed of discharge was a half-hearted measure, and the fact that they retained £124 out of the residue shewed the trustees did not consider that they had made any final appropriation. They submitted that, assuming there was an appropriation, such an appropriation as here—the setting aside of two sums on account of income—could not be held to deprive the trustees of their lien over the whole trust estate and right of indemnity over the whole funds which lawfully remained under their control. The trustees had accepted the trust, and therefore must be indemnified against the consequences resulting from that position.

(1) Court Sess. Cas. 4th Series, vol. vi. p. 1233. (2) 14 Ch. D. 374.

[They cited *Jervis* v. *Wolferstan* (1); *Phené* v. *Gillan* (2); *Noble* v. *Brett* (3); *March* v. *Russell* (4); *Chippendale* v. *German Mining Company* (5); *Exhall Coal Company* v. *Bleckley* (6).]

The *Solicitor-General for Scotland*, in reply.

The Law Lords having taking time to consider, delivered judgment as follows:—

Aug. 3. THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, the two first questions to be determined in this case are, whether the authority given by the trust disposition and settlement of Mrs. *Fraser* to her trustees to continue to hold any of her shares in public or other companies enabled them to set apart and appropriate, for the second and third purposes respectively of that settlement, the bank shares and other securities, which they did, in fact, retain for those purposes; and whether, if they had that authority, it was duly exercised?

Upon the first point it was argued that, because the power for the trustees "to continue to hold" the shares, &c., "should they consider it advisable or expedient to do so," is followed, in the settlement, by a power also "to lend or place out" the two legacies of £2000 each, "on such security or securities, heritable or moveable, as they shall consider advantageous," the former power could not properly be used for the investments contemplated by the latter, but must be construed as merely authorizing some delay, which might not otherwise have been proper, in the conversion of the truster's shares, &c., in public companies before the distribution of her residuary estate. I think that this is not a necessary, and that it would not be a reasonable, construction of the settlement. A power to "continue to hold" particular investments, made by the truster herself (without more) must, I think, be taken, *primâ facie*, to refer to those trusts which were to continue; and the only continuing trusts, in this case, were those expressed in the second and third purposes of the settlement.

Upon the second point, I cannot concur in the view which

(1) Law Rep. 18 Eq. 18.
(2) 5 Hare, 1.
(3) 24 Beav. 499, at p. 509.
(4) 3 My. & Cr. 31.
(5) 4 D. M. & G. 19, at p. 54.
(6) 35 Beav. 449, at p. 453.

4 Jur. N.S. 623.

12 Jur. N.S. 757

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seems to have been taken by some of the learned Judges in the Court of Session, that, because the trustees on the 20th of November, 1876, stated it to be their view that bank stock was not a suitable class of stock for trustees to hold, their subsequent decision to hold £200 *City of Glasgow Bank* stock for the investment of part of the legacy of £2000, given to Mrs. *Sinclair* and her children, ought to be regarded as an abdication of their duty of judgment, and for that reason a breach of trust. When the truster had expressly authorized the retention, for the purposes of the trust which she created, of these investments made by herself of which some were to her knowledge of a character not free from risk, and were at the same time productive of a variable amount of income, those facts alone could not make it a breach of trust for the trustees to act upon that authority, although their own preference might have been for securities unattended with any risk. The truster did not, indeed, direct them to take into consideration the wishes or the opinions of the life-renters, but I think it was proper and reasonable for them to do so, as long as they did not unduly favour the life-renters at the expense of their children, or either set of legatees at the expense of the other. In this case I find no indication of any improper purpose. It is true that some risk was necessarily incident to every such investment in bank stock, but there was no special reason for believing (and it is plain to me that neither the trustees nor Mrs. *Sinclair* did believe) that this particular investment in stock of the *City of Glasgow Bank* was attended with any extraordinary risk, which might not equally attach to shares or stock in any other well-established bank in *Scotland*. This stock, at the time of the appropriation, bore, and was valued at, a price sufficient to prove the credit in which the *City of Glasgow Bank* then stood, and to make the gain to the life-rentrix in point of income very inconsiderable. I am satisfied that the trustees acted in good faith, and that their decision to retain this stock was an honest exercise of the discretion given to them by the will. It would be extremely dangerous to hold that trustees, having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment, if they should dis-

regard, in the end, objections to which they had thought it right in the first instance to direct attention.

These investments, therefore, having been *bonâ fide* retained under sufficient authority, the next question is, whether the appropriations, as they were actually made, had the effect of severing the funds and securities set apart and appropriated for the second purpose of the will from those set apart and appropriated for the third purpose, so that the latter would not thenceforth be liable to make good any subsequent loss or deterioration of value sustained by the former, as between the two sets of beneficiaries? If such a severance was possible, it appears to me to be clear, that the intent and the effect of the discharge of the 22nd of March and 31st of May, 1877, was to make it. And not only was such a severance legally possible, but it also appears to me to have been the most proper (if not the only proper) mode of fulfilling the directions of the will. Before the residue of the truster's estate could be distributed, provision was to be made, by some authorized investment or appropriation, for these two legacies, given to different families under separate purposes of the will, and necessarily payable at different periods of time. If different sets of trustees had been nominated for them it would have been impossible to contend that, after the fund appropriated to each had been transferred to its proper trustees, there could be any subsequent community of loss or gain between them as to either income or capital; or that either fund was to be, in any way, responsible for the other. It cannot, in my opinion, make any difference, that the same persons were trustees for both, and were also trustees for the general purposes of the will. The English authorities, collected in the first volume of Mr. *White's* (4th) edition of *Roper* on Legacies, p. 942, rest upon principles equally applicable on both sides of the *Tweed*.

From this conclusion it seems to me to be a necessary consequence that neither the beneficiaries under the third purpose of this will, nor the trustees, could have any right to be indemnified against a loss sustained on the *City of Glasgow Bank* stock, at the expense of the Appellant, or of the funds and securities set apart for the Appellants' legacy. So far as the trustees were concerned, the retention of this bank stock, as an investment of part of the

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legacy given to the *Sinclair* family under the second purpose of the will (together with the personal liability incident to it), was their own voluntary act. That liability was not undertaken for the general purposes of the will, which necessarily ceased when the residue was divided; but only for the purpose of this particular *Sinclair* trust. The retention of such stock necessarily involved risks of trade, and entitled the trustees to be indemnified from those risks out of the trust funds of the legatees for whom it was held. But to employ other funds set apart for other legatees in the same or any other trade, there was no authority. To do so would have been, in my opinion, a breach of trust. Here, again, the principles of well-known English authorities, *Ex parte Garland* (1); *Ex parte Richardson* (2); *Cutbush* v. *Cutbush* (3); *M'Neillie* v. *Acton* (4)) are in point, and they appear to me to be as much applicable in *Scotland* as in *England*.

The result, therefore, is, that I am unable to concur in the interlocutors of the Court of Session now under appeal; and that I think those interlocutors ought to be reversed, and decree of suspension and interdict granted as prayed by the Appellant, with expenses below, and with the costs of this appeal; and I so move your Lordships.

LORD BLACKBURN, having stated the purposes of the trust deed, and, *inter alia*, the fact that Mrs. *Fraser* died possessed of £850 stock of the *Glasgow Bank* then valued at £1955, continued:—

I do not think that it can be doubted that, in the absence of something in the trust deed to the contrary, the duty of the trustees would have been to dispose of this stock, involving, as it did, a possible liability, which most people at that time thought would never come into operation, but which in fact did, within three years, come into operation in a very disastrous way. But Mrs. *Fraser* had expressly provided that her trustees might continue to hold such stock or shares as might belong to her at the time of her death, should they consider it advisable or expedient to do so.

(1) 10 Ves. at p. 119.
(2) Buck. at p. 209.
(3) 1 Beav. at p. 187.
(4) 4 D. M. & G. 750 *et seq.*

The Lord Ordinary came to the conclusion of fact that the trustees retained the £200, which they did retain, not because they deemed it advisable or expedient so to do, but because they surrendered their own judgment to that of Mrs. *Sinclair*.

I do not differ from the propositions of law involved, though not expressed, in this opinion. I think that trustees who incur a liability which, having reference to the trust which they have accepted, they ought not to incur, cannot claim to be indemnified for so doing out of the trust funds; on the contrary, they in general are liable personally to make good any loss which the trust funds have sustained in consequence of their so acting contrary to their duty. And I further agree that trustees are to exercise their own discretion. But I think they may inquire as to what are the wishes and opinions of others, especially of those who are interested, before they finally determine what, in the exercise of their own discretion, they think expedient, and I think that in this case there is no evidence that the trustees did more than they properly might. The Lord Ordinary seems to ground his opinion principally on a letter of the 28th of November, 1876. Mr. *Murdoch* was a member of a firm of writers, *Murdoch & Macpherson*, at *Huntly*, and that firm acted for the trust. In that letter, which, whether it was composed by Mr. *Murdoch* or his partner Mr. *Macpherson*, binds *Murdoch* as a member of the firm, it is said that their brokers recommended that this stock should be realized, "and our own" (that is the firm's) "view is that bank stock is not a suitable class of stock for trustees to hold." This was not, however, the view which Mrs. *Fraser*, the framer of the trust, had entertained; and, though I suppose every one connected with the matter now regrets that this view of the firm was not acted upon, I can see nothing to justify the conclusion that the trustees did not, in the exercise of their own discretion, *bonâ fide*, though, as it turns out, unfortunately, come to the conclusion that it was expedient to continue to hold this £200. I therefore differ from the Lord Ordinary on the inference of fact to be drawn from the letters.

Lord *Gifford* says:

It appears that Mrs. *Fraser*, the truster, at the time of her death, held various stocks in railways and other companies, and, in particular, she held £850

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of the consolidated stock of the *City of Glasgow Bank*. It was in reference to this condition of her estate, as I think, that she inserted in her trust deed the following clause:—"With power also to my trustees to continue to hold any or all of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained." The question is, what is the true construction and what is the true effect of this clause? Now it is contended that this is a general clause perfectly unlimited, which entitled the trustees not only to defer the winding up of the trust and the paying of the general residue for some indefinite but reasonable time, and until they found it expedient to sell or realize any shares in joint stock companies which might be temporarily depressed, but it is said it was a general power entitling the trustees to select and continue as the permanent investment of the two special legacies of £2000 each, all or any of the bank stocks or other stocks of which the testatrix might die possessed. After full and repeated consideration, I am really unable to come to this conclusion. I think it contrary to the very explicit powers and directions which the testatrix had given in reference to the two legacies of £2000 each, and contrary to the very conception of these legacies themselves. The truster knew, or she had been told, and quite rightly and properly told, that it would be the duty of her trustees immediately after her death to sell out and realize all her shares in trading, joint stock, and other companies, and she knew, or she had been told, that this was their duty, even if at the time of realization it should happen that the market was depressed or unfavourable for the realization of high prices for such descriptions of property. I think she intended to provide for this contingency, and no other. She gave her trustees a certain latitude or discretion that they might abstain from selling for such reasonable time as they might consider expedient, and she exempted them from personal responsibility if they should deem it expedient to delay realization. But all this had reference to her general trust. This discretionary power was granted to the trustees in order to save the estate from loss from forced realization at an unfavourable time, to the disadvantage of the residuary legatees. It was for the benefit of the residuary legatees, who were interested only in the residue, that the realization should not be hurriedly made, and made at a loss. The possible risk of loss from unfavourable realization had really little or nothing to do with two specific legacies of £2000 each, which were quite fixed in amount, and the beneficiaries in which, as such, had no concern with how the residue might turn out, or whether the stocks in public companies were sold at a time of depression or not. So long as there was a residue at all—and the residue here was £1200—it did not matter to the special legatees, who, as such, had only fixed pecuniary legacies, what loss might occur in the realization of the general estate, so long as the realization was not so low as to destroy the residue altogether. That was the concern of the residuary legatees, and these were the whole three children of the testatrix. The continuing to hold stocks which formed part of the trust estate, and the abstaining from selling or selling or realizing them, was, I think, all to be before the division of the general residue, and before the payment or the lending out of the pecuniary legacies. The clause, I think, was not intended to govern, and had no reference to the permanent management and investment of the special legacies of £2000 each—a management which might endure for many a long year, and

for which the trust deed makes separate and ample provision. This is the conclusion to which I have been forced to come, though not (as I have said, and especially after hearing your Lordships' opinions) without difficulty and hesitation. It leads to the result that it was *ultrà vires* of the trustees to take £200 of the stock of the *City of Glasgow Bank* as part of the investment of the legacy of £2000 which Mrs. *Sinclair* and her children are interested in.

If this was the true construction of the deed, I think that the trustees could not maintain any claim to be reimbursed from the trust estate for a liability which they ought not to have incurred, whatever might be their claim against the personal interest of those at whose instance and for whose benefit they incurred the liability. But I cannot agree in this construction. I think that if Mrs. *Fraser* had meant to give her trustees a discretion to continue to hold the stocks only until the residue was realized and no longer, she would have said so in plain terms, which she certainly has not done. I need not inquire what would have been the case if the trustees had invested some of the money in the purchase of more *City of Glasgow Bank* stock, that is not what they did. But Mrs. *Fraser* thought that she had invested her property well, and therefore allowed her trustees to continue to hold any of those stocks, though she did not direct them so to do. On this part of the case I agree with the Lord Justice Clerk and Lord *Ormidale*, and need not repeat their reasons.

But this does not dispose of the case. The Complainer's pleas in law below contain these:—[Reads them as given above].

The pleas in law for *William Murdoch* are, amongst others:—[Reads].

Which is right depends, in my opinion, mainly upon the true construction of the trust instrument, which regulates what the trustees could do; but partly on the inference to be drawn by the Court from the documents as to what they did do.

This is, in my opinion, the most difficult part of the case; and I am here obliged to differ from the majority of the Court below, both as to the fact and as to the law, for I think the second and third pleas in law for the Complainer below are well founded, and that it is not made out that the case is such that the three pleas of the Respondent *Murdoch* apply to it. I do not think it necessary to form any opinion as to the fourth plea of the Complainer.

The trustees are by the trust deed required, before paying over

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the residue, to make provision for payment of the legacies, and they are empowered "to lend or place on such securities heritable or moveable as they shall consider advantageous the aforesaid legacies of £2000 and £2000 respectively, the said securities to be conceived in favour of my trustees, and that for the purposes of this trust and not otherwise," and to vary the securities from time to time. I have already given my reasons for thinking that they might continue to hold any of the stocks belonging to Mrs. *Fraser* at the time of her decease, though not such as trustees would generally be justified in holding, and were not bound to sell them and invest the £2000 and £2000 in other securities. And I think, therein agreeing with Lord *Gifford*, and differing from the Lord Justice Clerk, and perhaps from Lord *Ormidale*, though of that I am not quite sure, that the true construction of the trust deed is such that the trustees, if not required to sever the securities for the two sums of £2000 and £2000, and set aside certain securities for the one legacy and certain securities for the other, were at least empowered to do so; and I think that they have done so, the two being from the time they so did two distinct branches of the trust for two distinct parties. It certainly, where the trusts remaining to be fulfilled are for the benefit of different parties and quite independent of each other, would be the ordinary and convenient course to do so; and I cannot resist the conclusion from the words of the trust deed that Mrs. *Fraser*, or rather those who drew up the deed for her, meant that ordinary and convenient course to be followed. It was argued at your Lordships' bar that if such was the intention it ought to have been provided that there should be, or at least might be, separate trustees for the *Sinclair* family and the *Robinson* family, and that in the trust deed now under consideration not only are the same trustees originally appointed, but the power to assume fresh trustees is so worded as to shew that they must always be the same.

I quite agree that the intention, if it be what I think it is, could have been more clearly expressed. If it had been provided that the securities for the *Sinclair* £2000 should be invested in the names of the original trustees and such persons as they might from time to time appoint as trustees for the *Sinclair* £2000, and a similar provision made as the *Robinson* £2000, no one could have

doubted that the trusts were intended to be severed. It is because this is not so clearly expressed that the question is one of difficulty. The Lord Justice Clerk seems to have thought it not a question of any difficulty. He takes the opposite view from that which I do, but he hardly explains his reasons for that opinion. Lord *Gifford* gives his reasons for taking the view which I take. Lord *Ormidale* says:

> The separation and allotment of the trust estate referred to consisted in nothing more than book entries and accounts made, so far as I can discover, for no other purpose than convenience in dealing with the interest of two separate individuals, Mrs. *Sinclair* and Mrs. *Robinson*. There was certainly no transference or investment in any form of the bank stock in the name of Mrs. *Sinclair*. It was held at the last and throughout, as it was at the commencement of the trust, in the names of the trustees for the purposes of the trust. Supposing, however, that such a separation and allotment as that alleged by the suspender did take place, the bank stock still continued part of the trust estate as it had previously been. Nor can I find anything in the deed of discharge which was executed by the parties interested, after the trustees had laid aside what they at the time considered sufficient to meet the two legacies of £2000 each. On the contrary, I find that in the trust deed it is expressly declared that the securities for these legacies "shall be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise." Keeping this in view, and that Mrs. *Sinclair* and Mrs. *Robinson* were respectively only entitled to the annual rent or interest arising out of the two legacies of £2000, the capital sum ultimately going on their deaths to others, it cannot admit of doubt, I think, that there were no new and separate trusts in reference to these legacies contemplated by the truster, or could have been created under the deed of settlement.

The inference I draw from the documents, more particularly the deed of discharge, and Messrs. *Murdoch* and *Macpherson's* mode of stating it in their books, is that the trustees did (if they had power to do so) sever the investments, for the behoof of the *Sinclairs*, from those for behoof of the *Robinsons*, and declare that the £2000, less legacy duty, held for behoof of Mrs. *Robinson* and her children was invested in the stocks, which are now the subject of the interdict. I think this was done for convenience in dealing with the interest of two separate families, and it is principally because I think this so obviously convenient and usual in such cases, that I put the construction on the words of the trust deed, that the intention was to authorize, if not require, this to be done, though I think that this intention might have been more clearly expressed.

If this is right, I think that the second plea of the Complainer

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correctly states the law, and that the right which the trustees have to come upon the fund for indemnity is limited to the trust funds on account of which the £200 bank stock was retained, and so the liability was incurred.

The Lord Justice Clerk says, that the amount of the calls which the trustees paid was "a direct debt of the maker of the trust for which the whole of her trust funds in the hands of the trustees must be liable." I think, if it was a direct debt of Mrs. *Fraser*, the whole of her funds whether included in the trust or not would be liable; but I cannot agree that it ever was a debt from her at all. It did not accrue till more than two years after her death, and the liability is incurred not because the shares had been hers at the time of her death, but because her trustees chose (justifiably, as I think, though most unfortunately) to continue to hold them till after the bank stopped, and that according to the view I take they did for the benefit of the *Sinclair* family, and not for the benefit of the maker of the trust or the trust generally.

It was argued that the maker of a trust is personally bound to indemnify the trustees for all costs and liabilities properly incurred in the execution of the trust, but I do not think this is the law. No doubt any one who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound, at law as well as in equity, to indemnify him; this principle applies to many cases, and where a trust is for the benefit of the maker of the trust it may apply to a trustee. *Balsh* v. *Hyam* (1) is a good example of a case where it did apply, and there are many others. In *Jervis* v. *Wolferstan* (2) the Master of the Rolls goes so far as to say, "I take it to be a general rule that where persons accept at the request of another, and that other is a *cestui que trust*, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust." Perhaps this rule is too broadly stated, as something must depend on the nature of the trust and of the interest of the *cestui que trust*, but it is not necessary now to say more than that this rule has no application to a case where the maker of the trust is not a *cestui que trust*. When he is not, I think he cannot merely as maker of a trust be so liable. The trustee voluntarily accepts the

(1) 2 P. Wms. 453. (2) Law Rep. 18 Eq. at p. 24.

trust, and can only incur liability in consequence of his own act in so accepting; unless there be an express or implied bargain for indemnity from the maker of the trust, he must be taken to accept the trust relying on the trust funds. He has, no doubt, a right to charge the trust funds with all just allowances.

Lord *Cottenham*, in *Attorney-General* v. *Mayor of Norwich* (1), states the rule thus, "I apprehend it to be quite clear according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust." But this, I think, does not extend so far as to enable them to apply all funds, part of the property which they took in trust, and of which they are not divested, in relief of expenses incurred on behalf of a separate branch of the trust, and not at all on behoof of the funds from which it is sought to obtain relief. In *Attorney-General* v. *Lawes* (2), *Wigram*, V.C., states it to be "a well settled rule that, where a legacy has been severed from the bulk of an estate, and become the subject of litigation, that particular fund, and not the general estate, is to bear the costs." If this was merely a rule of practice as to costs, however well settled it might be in *England*, it could have no effect in a Scotch case, but it seems to me to be an application of a general principle, which, I should think, must be the same in every system of jurisprudence in which trusts exist. That principle is, I think, involved in the decision of Lord *Eldon* in *Ex parte Garland* (3). There a miller made his will, dated the 17th of February, 1798. He left all his personal property to three trustees, one of whom was his wife, *Margaret Ballman*. He also appointed them his executors, but that I think not material. By the will the testator directed that his trade of a miller, and the farming business then carried on by him, should be carried on by *Margaret Ballman* until his trustees should think proper to establish his sons or either of them therein; and he directed his trustees, upon so

(1) 2 My. & Cr. at p. 424.
(2) 8 Hare, at p. 43.
(3) 10 Ves. Jun. 110.

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settling his sons or either of them in the business, to permit them to take off the stock, crop, and other effects in the said business at a fair valuation, and to take a bond or note from them for the amount. He also directed that, as long as the businesses should be carried on by his wife, the profits thereof should be applied for her own use and for the maintenance and education of his children, and that an inventory and valuation of his stock, crop, and effects in his said businesses should be taken within six weeks after his decease, and that any sums not exceeding £300, which, by a codicil, he increased to £600, should be paid by his trustees to *Margaret Ballman* out of his personal estate, for the purpose of enabling her to carry on the businesses, and that she should give notes of hand to the other trustees for the sums so advanced to her, and the amount of the valuation.

It is not stated when the testator died, probably it was not long after the date of his will. After his death *Margaret Ballman* carried on the trades till December, 1801, when she became bankrupt. She had given notes of hand to the trustees for the sum of £1351 5*s.*, the amount of the valuation, and £600 which they had advanced to her in pursuance of the directions in the will. She also had received £768 12*s.* 4*d.* of the testator's assets. The surviving trustee proved under the commission. The assignees presented a petition praying that the proof might be expunged, and that it might be declared that the whole of the personal estate of the testator was liable to all the debts contracted by the bankrupt in carrying on the trades under the directions of the will. The Lord Chancellor expressed a clear opinion that the surviving trustee, as a creditor on the notes, must be postponed to the creditors of the bankrupt, but directed a further argument as to the other point.

The counsel for the assignees argued that if a trustee is directed to carry on a trade, and does so, he makes himself personally liable to the whole of the debts contracted in that trade, which, hard as it may be, is clearly law. He then argued that it followed that he must have the right of resorting for his indemnity to the whole personal estate given to him with a direction to carry on the trade; and that it followed that the creditors must have it, at least by circuity, to the same extent.

Lord *Eldon*, however, said that the case of the executor was no doubt very hard, as he might be proceeded against as a bankrupt, though he was but a trustee, "but he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility." He says that the creditors "have something very like a lien upon the estate embarked in the trade, they have not a lien upon anything else." No more is said as to the argument that the trustee had a personal right to indemnity, and that, consequently, her assignees had a similar right at least by circuity.

The extent of the right which trustees have to be indemnified, and the manner in which creditors can by circuity work it for their own benefit, were discussed by the Master of the Rolls in *In re Johnson* (1). The Master of the Rolls there says what *Ex parte Garland* decides is "that the claim of the creditors is limited to the assets devoted to trade."

On the question whether the whole assets of the testator were directly liable to the debts incurred in the trade which the testator directed to be carried on, Lord *Eldon* proceeds very much on the general inconvenience that would be produced if the estate could not be wound up effectually so long as the trade was carried on, perhaps for a century. In the case before him the trade had not been carried on for more than two years, and at most a few months more, but in laying down the law he had to consider what might have happened. I think it clearly must have been the Lord Chancellor's opinion that the trustee who, of his own choice, placed himself in the situation of incurring liability for a trade which the framer of the trust directed to be carried on with a particular part of his assets, had no right to come for indemnity upon the rest of the assets. And this is, I think, the guiding principle to be applied in this case, as soon as it is determined that the two branches of the trust, that for the *Sinclair* family and that for the *Robinson* family, were severed. On that subject I have already said what is my view. I think, therefore, that the interlocutor of the Lord Ordinary was right, though not for the reason given in his note; and that the appeal should be allowed, with costs, and that interlocutor restored.

(1) 15 Ch. D. 548.

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LORD WATSON:—

I am of opinion that the interlocutors under appeal ought to be reversed, and that the judgment of the Lord Ordinary, which was approved by Lord *Gifford*, one of the three Judges of the Second Division, ought to be restored. It is necessary to explain the grounds upon which I have come to that conclusion, because I concur in part only of the opinion of Lord *Gifford*, and am unable to assent to the reasons assigned by the Lord Ordinary for his judgment.

The trusts of the late Mrs. *Fraser's* settlement are not complicated. After providing, in common form, for payment of her debts, death-bed and funeral expenses, the testatrix appoints her trustees to make payment of the interest or annual rent of £2000 to her daughter Mrs. *Sinclair* during her lifetime, and of the capital to her children after her decease, and to make payment, in like manner, of the interest or annual rent and of the capital of another sum of £2000 to her daughter Mrs. *Robinson* and her children. The testatrix then bequeaths £5 to each of her trustees, and directs them, after payment of debts, and after "making provision for payment of the legacies above mentioned," to divide the free residue of the trust estate equally between her son, *James Robb*, and her two daughters, Mrs. *Sinclair* and Mrs. *Robinson*.

The estate falling under the trust, amounting in value to £5000, or thereby, consisted chiefly of railway stocks, and of £850 consolidated stock of the *City of Glasgow Bank*, which was duly transferred to the Respondent, *William Murdoch*, and his co-trustee, *James Fraser Robb*. The trustees, in the course of their administration, sold bank stock to the extent of £650; and after paying debts, expenses, and minor bequests, they proceeded to make provision for payment of the two legacies of £2000 to the daughters of the testatrix and their issue, by appropriating to them severally the remaining stocks which had belonged to the testatrix, at their current value in the market. In this division, the unsold balance of £200 *City Bank* stock was, with the knowledge and consent of Mrs. *Sinclair*, appropriated to her and her children, as representing part of their £2000. The funds remaining in the hands of the trustees, after such appropriation, were equally divided among the three residuary legatees. These arrangements

are narrated in detail in a deed of discharge executed by the residuary legatees in March and May, 1877. It proceeds upon the recital that the trustees "have invested" each of the two legacies of £2000 upon the respective stocks therein specified; and in respect that they had been paid or received credit for their several shares of the remainder, the residuary legatees thereby exoner the trustees of their whole actings and management, and discharge all claims of residue competent to them under the provisions of the deed of trust. The books and accounts of the trust shew that, from the time the two legacies were thus severed, each of the daughters of the testatrix received the income of the stocks which had been assigned to herself and her family, under deduction of expenses applicable to her own stocks.

It appears to me that all these acts of administration were authorized by the terms of the trust deed, and were therefore *intra vires* of the trustees.

Lord *Gifford* was of opinion that, in assigning these stocks to the beneficiaries, the trustees acted in excess of their powers; and it would certainly have been their plain duty to realize, had not the testator given them express power "to continue to hold all or any of such shares or stocks, in public or other companies, as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained." His Lordship held that this was not a continuing power applicable to all the purposes of the trust, but merely a power to delay realization, and consequently to postpone the distribution of the residue. I am unable to adopt that view. A general power to retain stocks in which the testatrix has already invested does not differ, in its scope, from a general power to invest in these stocks. What the trustees can do in the one case by making a new, they can effect in the other case by retaining an old investment; and in the present instance the terms of the power are wide enough to cover all purposes of the trust requiring investment. I therefore think that the trustees were entitled in their discretion to retain these stocks, as an investment of the £2000 legacies, instead of realizing the stocks, and then investing £4000 upon moveable or heritable securities.

The Lord Ordinary decided against the Respondent in this

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appeal, on the ground that, in retaining the £200 *City Bank* stock as part of Mrs. *Sinclair's* legacy, the trustees did not act within the power entrusted to them by the testatrix, that they surrendered their independent judgment, and acted in accordance with the wishes of Mrs. *Sinclair*, and against their own convictions. There does not appear to me to be any evidence sufficient to bring such a serious charge home to the trustees. No doubt they did consult the beneficiary most interested in the matter, and what they did had her approval; but I do not think there is ground for the inference that the trustees did not regard the retention of the bank stock as a proper act of administration, or that they thought it would be attended with any appreciable risk either to the beneficiaries or to themselves.

I am further of opinion that the trustees had power to sever these £2000 legacies, and to place them in separate investments for behoof of the respective beneficiaries. The trust deed authorizes them to lend out upon certain securities "the foresaid legacies of £2000 and £2000 respectively," and these words appear to me to confer upon the trustees, by plain implication, a right to make the severance if they chose. It may be doubted whether, in the due administration of the trust, the trustees could have declined to sever these legacies, but in the view which I take of the case it is unnecessary to decide that point.

If, instead of severing the two legacies, the trustees had been entitled and had thought fit to make provision for their payment by retaining in their hands an undivided fund of £4000, the present question could hardly have arisen, assuming always that the trustees had power to retain the £200 *City Bank* stock as a trust investment, after distribution of the residue. In that case the two families of *Sinclair* and *Robinson* would have been equally interested in the investment, they would have shared in any increment of the value of the stock, and would have borne alike any loss arising from its depreciation. I did not understand it to be disputed, and I think it clear that, had matters stood in that position, the trustees would have been entitled to recoup calls paid by them to the liquidators of the *City Bank* out of the remaining funds or stocks held by them for the purpose of paying the two legacies.

The real question in this case, according to my apprehension of

it, comes to be—What was the effect of the severance of the two legacies upon the right of indemnity competent to these trustees so long as they held, and were justified in holding, the trust estate as an undivided whole? I cannot agree with the opinion expressed by the late Lord *Ormidale*, one of the two Judges composing the majority of the Second Division, to the effect that the appropriation of the stocks held by the trustees consisted of mere book entries made for convenience in dealing with the interest of the life-renters, Mrs. *Sinclair* and Mrs. *Robinson*. The appropriation of these stocks, if authorized, as I hold it to have been, by the terms of the trust deed, was an act of administration which the trustees of themselves had no power to undo. The immediate effect of that act was to alter the pecuniary interests of the two sets of beneficiaries concerned, and the relations subsisting between them and the trustees. The beneficial interests of Mrs. *Sinclair* and her issue on the one hand, and of Mrs. *Robinson* and her children on the other, were thenceforth limited to the stocks severally assigned to them, and the trustees ceased to be under any liability to account to either life-rentrix and her children for the stocks appropriated to the others. Two trusts were created instead of one, with separate funds, and different beneficiaries having no community of interest. Such being the legal result of the appropriation, it is, in my opinion, immaterial whether the authority to constitute these two trusts was derived from one and the same deed, or whether each was constituted by virtue of a separate deed under the hand of the testatrix.

In that state of circumstances I am at a loss to conceive upon what principle of law or equity the Respondent can claim to be indemnified for loss arising upon the £200 *City Bank* stock appropriated to Mrs. *Sinclair*, out of the funds assigned to the Appellant and her children. There is no positive rule of law upon which such a claim can be supported, and I do not know of any equitable claim to indemnity, recognised by the law of *Scotland*, which does not rest upon the maxim of the civil law, "*Cujus est commodum ejus quoque debet esse incommodum.*" Those authorities in the law of *England* to which your Lordships have referred lead to precisely the same result. It may be a hard thing that the Respondent has personally to bear loss arising upon a trust

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investment in which he had no personal interest; but he voluntarily undertook the risk when he consented to hold *City Bank* stock as trustee for behoof of Mrs. *Sinclair* and her children. In my opinion it would be a still harder thing to inflict that loss upon the Appellant, who had as little personal interest in the matter as the Respondent, but, unlike the Respondent, had no power either to prevent such an investment of Mrs. *Sinclair's* legacy, or to protect herself from its consequences.

In the Court below, the Lord Justice Clerk decided in favour of the Respondent, solely on the ground that the calls made by the liquidators of the *City Bank* constituted a debt of the truster, Mrs. *Fraser*, and, if that assumption had been well founded, it appears to me that the judgment of the Second Division would have been right. But it seems clear that these calls were never, in any sense, a debt due by the truster or by her estate. The claim of the liquidators was a claim against the trustees personally, arising out of that course of administration by which they became and continued to be partners of the bank. But if any doubt could be raised on this point, it is completely disposed of by the judgment of Lord *Eldon* in *Ex parte Garland* (1).

I therefore concur in the judgment proposed by your Lordship.

JUDGMENT.—*Ordered* and *Adjudged*, That the said interlocutors of the Lords of Session in *Scotland*, of the Second Division, of the 10th of March and 18th of May, 1880, complained of in the said appeal, be, and the same are hereby reversed, and that the interlocutor of the Lord Ordinary, of the 6th of January, 1880, be, and the same is hereby restored: And it is *Ordered*, That the cause be remitted back to the Court of Session in *Scotland*, to do therein as shall be just and consistent with this judgment: And it is further *Ordered*, That the Respondents do pay or cause to be paid to the said Appellant the costs incurred by her in respect of the said appeal to this House, and also her expenses in the Court below.

Lords' Journals, 3rd August, 1881.

Agents for Appellant: *Holmes, Anton, & Greig.*
Agents for Respondent: *Martin & Leslie.*

(1) 10 Ves. at p. 119.

[HOUSE OF LORDS.]

COMMISSIONERS OF SUPPLY OF THE COUNTY OF ABERDEEN . . . . . } APPELLANTS;
MORICE . . . . . RESPONDENT.

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Roads and Bridges (Scotland) Act, 1878 (41 & 42 *Vict. c.* 51), *ss.* 4, 5, 6, 7, *and* 37—*Construction of.*

The trustees of the *W. S.* bridge, which spans the River *Dee* and connects the counties of *Kincardine* and *Aberdeen*, sought to have it found that the local Acts 10 Geo. 4, c. 43, and 23 Vict. c. 26, being the *W. S. Bridge* and Road Acts—had ceased to be of force and effect within the county of *Kincardine* (that county having adopted the *Roads and Bridges Act*, 1878): That the trustees have ceased to be under any obligation as regards the management or maintenance of the bridge or road, and that the Defenders, the county road trustees of *Kincardine*, and the commissioners of supply of the county of *Aberdeen*, are bound to maintain and keep in proper repair the bridge and road: and further, that the trustees have ceased to be liable for the debts incurred by them as trustees. By the local Act of 1865 tolls were abolished in the county of *Aberdeen*; but from its provisions the burgh was excluded. The *Aberdeenshire* portion of the road and part of the bridge are within the burgh boundary.

The county of *Aberdeen* has not adopted the Act of 1878, and the commissioners of supply of that county deny any liability in respect to the maintenance, &c., of the bridge and road:—

Held, reversing the interlocutors of the Court below, that the true effect of the *Roads and Bridges Act*, 1878, in the circumstances, was to continue in force the local Acts so far as the powers and duties thereby imposed on the trustees for the management, &c., of that part of the bridge and road which is within the county and parliamentary burgh of *Aberdeen*, together with the powers of demanding and taking tolls within the county and burgh conferred by such Acts so long as the *Roads and Bridges Act*, 1878, shall not be in force therein: that the liability of the trustees to the debts incurred under the local Acts had now ceased and fallen severally upon the Defenders: that the commissioners of supply are entitled to receive from the *W. S.* bridge and road trustees all surplus of income accruing to them from tolls exacted on the bridge and road within the county and parliamentary burgh of *Aberdeen*, after providing for the expenses of management, &c., and on doing so, are entitled to be relieved by them from the proportion of the debts belonging under the *Roads and Bridges Act*, 1878, to the county and parliamentary burgh of *Aberdeen*; and that as regards that part of the bridge and roads within the county of *Kincardine*, the local Acts had ceased to be in force; and the road trustees of that county are bound to maintain and keep in repair that part of the bridge and road.

APPEAL from a judgment of the Second Division of the Court of Session.

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This action was raised by the Respondent, Mr. *Morice*, as clerk to and as representing the *Wellington Suspension Bridge* trustees, Pursuers.

The principal Defenders were the Appellants, the commissioners of supply for the county of *Aberdeen*, and the county road trustees of *Kincardine;* other Defenders were several creditors, but they were not in any way interested, as no question was raised as to the debts of the trustees. The trust managed by the trustees was constituted by the Act 10 Geo. 4, c. 43, and has been continued under 23 Vict. c. 26. The works executed and subsequently managed by the trustees are the *Wellington Suspension Bridge*, which spans the River *Dee*, nearly opposite to the town of *Aberdeen*, and 650 yards of road in the county of *Aberdeen*, and about four miles of road in the county of *Kincardine*.

The county of *Kincardine* has adopted the *Roads and Bridges (Scotland) Act*, 1878 (41 & 42 Vict. c. 51), and tolls are consequently (sect. 6) abolished in *Kincardineshire*. But the other end of the bridge, at which there is a toll-bar, rests on ground which, although within the county of *Aberdeen*, is as regards road purposes, within the jurisdiction and bounds of the town council of *Aberdeen*, and the 650 yards of road is in the same position. On the other hand the roads in the county of *Aberdeen* beyond the parliamentary boundaries of the city are under the jurisdiction of the *Aberdeen* county road trustees in terms of the *Aberdeenshire Roads Act*, 1865, under which tolls were abolished in that county. That statute excludes from its provisions abolishing tolls the burgh of *Aberdeen*. In these circumstances the Respondent, acting for the trustees of the *Wellington Suspension Bridge*, the Pursuers, raised the present action to have it found that the above given local Acts for erecting and maintaining the *Wellington Suspension Bridge* have ceased to be of force and effect within the county of *Kincardine;* and further, and whether or not it be so found, that it ought and should be found and declared, that the Pursuers have ceased to be under any obligation, right, privilege, or duty in regard to the management or maintenance of the above-mentioned bridge and road, and that the Defenders, the county road trustees of *Kincardine* and the commissioners of supply of the county of *Aberdeen* are bound to maintain and keep in proper repair the said bridge and road; and further that it ought

to be found that the Pursuers have ceased to be liable for the debts incurred by them as trustees, and for the sums subscribed for the erection of the bridge and road, and the Defenders, the said county road trustees of *Kincardine* and the commissioners of supply of the county of *Aberdeen*, are jointly and severally liable therefor, and are bound to free and relieve the Pursuers thereof; or otherwise in the event of the Pursuers being under any obligation, &c., in regard to the management and maintenance of the bridge and road, it ought to be found that the Pursuers are entitled to demand and take, within the county of *Aberdeen*, as or for tolls or pontage, the various sums provided and in manner provided by the Act 10 Geo. 4, c. 43.

The Appellants denied any liability. Their pleas in law were:

(2.) The bridge libelled and the *Wellington Road* being within the city of *Aberdeen*, the conclusions of the action, in so far as they affect the present Defenders, cannot, on a sound construction of the *Roads and Bridges Act*, 1878, be maintained.

(3.) In any view, the roads and bridges within the county of *Aberdeen*, and the whole relative rights and liabilities, being vested in the trustees acting under the *Aberdeenshire Roads Act*, 1865, the commissioners of supply of the county are under no liability in reference thereto.

(4.) The *Wellington Bridge* Acts being continuing Acts under the provisions of the *Roads and Bridges Act*, 1878, and specially sects. 5 and 37 thereof, the portion of the bridge and road within the city of *Aberdeen* continues to be vested in the Pursuers; and the present Defenders, on a sound construction of this Act, are subject to no liability in connection therewith.

The road trustees of the county of *Kincardine* admitted a proportionate liability. By sect. 9 of the *Wellington Suspension Bridge and Road Act*, 1860 (23 Vict. c. 26), the trust and its constituting Acts were made subject to the provisions of any general Act relating to turnpike roads in *Scotland*.

The material clauses of the *Roads and Bridges* (*Scotland*) *Act*, 1878, are as follows:

(Sect. 4.) All local Acts now in force for regulating, managing, making, maintaining, or repairing any turnpike road or statute labour road, or other highway situated or situated partly in any county (including the burghs wholly or partly within the same) in which tolls or statute labour, or either thereof, have not been abolished shall continue in force until the 1st of June, 1883, and no longer, unless in the meantime this Act shall be adopted, or tolls and statute labour shall be legally abolished in such counties. From and after the time at which any such Act or Acts shall cease to be in force in any county (including as aforesaid), this Act shall, unless Parliament otherwise provides, commence to

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have effect therein. Where any Act relates to a turnpike road which is situated in more than one county, notwithstanding that such Act has ceased, in terms of this Act, to be in force in one county in which such road is situated, it may nevertheless continue to be in force in the other county or counties in which such road is situated.

(Sect. 5.) Where any local Act in force in a county in which tolls and statute labour have been abolished or are not exigible is limited as to its endurance, such Act shall continue in force until this Act shall be adopted in such county.

(Sect. 6.) (1.) In those counties in which tolls and statute labour have been abolished, or are not exigible, or power has been obtained to abolish them, or to arrange for their abolition, this Act may be adopted in place of the local Act or Acts relating to roads, highways and bridges therein in force in such county, on a resolution agreed to by .... the trustees under such Act or Acts ....

Upon the adoption of this Act in any such county any local Act or Acts in force therein as aforesaid shall stand repealed.

(2.) In any other county this Act may be adopted on a resolution to that effect agreed to by a majority of the commissioners of supply of such county ....

Upon the adoption of this Act in any such county any local Act or Acts in force therein relating to roads, highways, and bridges shall stand repealed.

(Sect. 7.) Where it shall happen that this Act has been adopted or is in force in any county, but has not been adopted or is not in force in the county or counties adjoining thereto, any obligation, right, privilege, or duty in regard to the management and maintenance of and the debt affecting turnpike roads partly situated in two or more counties (including the burghs wholly or partly within the same) which, had this Act been adopted in the latter county or counties, would have fallen upon or belonged to the county road trustees or burgh local authority or authorities thereof, shall fall upon or belong to the commissioners of supply thereof, and in so far as consisting of or resulting in payments of money such payments shall be a good charge upon and be defrayed out of, or may be borrowed upon, the credit of the county general assessment of such county or counties: Provided always, that as soon as this Act shall have been adopted or be in force in such county or counties, the obligation, right, privilege, or duty before mentioned, in so far as not already fulfilled, exercised, or discharged, and especially any obligation to repay any sums which may have been borrowed as aforesaid, and interest thereon, so far as unpaid, shall be transferred from the said commissioners of supply to the county road trustees of the said county or counties, and local authority or authorities of the said burgh or burghs, as the case may be: Provided that where necessary for giving effect to the provisions contained in this section, "county road trustees" or "trustees" or "board" shall be held to mean and include commissioners of supply; "county road clerk" shall be held to mean and include clerk of supply.

Whenever, in terms of this section, any obligations fall upon the commissioners of supply of a county, the trustees of such road shall, after providing for the expense of managing and maintaining the same, pay over to such commissioners of supply the surplus of income accruing to them from the tolls which, subject to the provisions of this Act, may be exacted on such road; and the said trustees shall not be entitled to reduce the tolls exacted thereon without the consent of such commissioners of supply.

(Sect. 37.) Where any trust existing at the commencement of this Act

embraces a turnpike road which is not situated wholly within one county or burgh, the following provisions shall have effect. . . . .

(2.) Where this Act shall have been adopted in or shall be in force in one or more of the counties or burghs in which such road is situated, but shall not have been adopted or shall not be in force in all of such counties or burghs:—

(*f.*) The portion of such road within any county or burgh in which this Act has not been adopted or is not in force shall continue to be vested in and managed and maintained by the trustees having the management thereof at the commencement of this Act.

(*i.*) Where a bridge is not situated wholly within one county or burgh, the expense of maintaining, and if need be of rebuilding the same, shall, failing agreement, be a charge equally against the trustees of the county or local authority of the burgh within which it is partly situated and the trustees having the management of such road, as the case may be. The management of the bridge shall, failing agreement, be vested in a joint bridge committee to be appointed by the trustees, whether appointed and acting under this Act or not, or local authorities chargeable with the cost of maintenance and rebuilding.

(Sect. 66.) Where any trust existing at the commencement of this Act comprises any road, highway, or bridge, partly situated in or made a burden on two or more counties in *Scotland*, whether all of such counties shall have adopted this Act or not, the trustees of such counties respectively may adjust, compromise, and determine in what proportion the debts valued as aforesaid affecting such trusts, shall be allocated and made chargeable upon such counties respectively." . . . .

On the 3rd of January, 1880, the Lord Ordinary (1) considering the question was governed by the 7th section of the statute repelled the defences for the Appellants, and decerned in favour of the first alternative conclusions of the summons, with the qualifying declaration that the liability of the Defenders respectively is according to the proportion in which the road and bridge are situated in the respective counties, and that this decree shall not prejudice any question regarding the said proportions and the adjustment of the said liability *inter se* accordingly; and found the Appellants liable in expenses to the Respondent, and also to the road trustees of *Kincardine*.

The Lords of the Second Division on the 19th of March, 1880 (the Lord Justice Clerk dissenting), refused a reclaiming note lodged by the Appellants, and adhered to the Lord Ordinary's interlocutor.

Against these interlocutors the Commissioners of Supply for the county of *Aberdeen* appealed, having for their counsel *The Solicitor-General for Scotland* (*J. B. Balfour*, Q.C.), and Mr.

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Benjamin, Q.C. (with them Mr. *F. Irvine*). Their argument is sufficiently referred to in the opinions of the Law Peers.

Sir *F. Herschell*, S.G., and Mr. *Badenoch Nicolson*, were heard for the Respondent.

The Law Peers delivered judgment as follows:—

LORD SELBORNE, L.C.:—

My Lords, as was stated in his reply by the learned *Solicitor-General for Scotland* three distinct views of the rights of the parties have been presented in argument to your Lordships. One of them is that taken by the Court below in their judgment. That view, as has been stated, treats this case as governed exclusively and altogether by the 7th section of the Act of 1878, disregarding both the latter clause of that section (to which apparently it ascribes a merely temporary application) and also the 37th section. That is the one extreme view which is entirely favourable to the Respondent, who was the Pursuer in the action. The next view is that of the Appellants and of the Lord Justice Clerk; it would altogether displace all the conclusions of the action by making the 7th clause entirely inapplicable to the present case. Between those two views there is an intermediate one, which I believe your Lordships are all of opinion is the correct and proper view to be taken in this case.

I will first observe that, by the 4th, 5th, and 6th sections of the *Roads and Bridges (Scotland) Act* of 1878, the local Acts which were applicable to county or burgh roads or bridges were clearly kept in force in the places to which they were applicable, until by some means or other the Act itself should take their place, which might be either by adoption, or, if there were no adoption, it would happen on, I think, the 1st of June, 1883. We have to consider the effect of the 7th section in a case in which the Act has not been adopted, and in respect of the period which may now elapse until it shall be adopted, or until the 1st of June, 1883. In the meantime, as I have said, the effect of those three sections, the 4th, 5th, and 6th, is, as I take it, clearly to keep alive and unrepealed the local Acts. That seems to me an im-

portant step towards the solution of the difficulties, such as they are, which arise upon the 7th section.

Now, when we come to the 7th section, I will first consider the view of it which appears to have been taken by the Lord Justice Clerk, and which would result in the entire success of the present appeal. As I understand the Lord Justice Clerk, he would have adopted the view which I have described as intermediate, but for his Lordship's opinion that in the county of *Aberdeen* the payment of tolls had altogether ceased, and that the parliamentary burgh of *Aberdeen* was not to be regarded for the purposes of this 7th section as any part of the county. In point of fact, my Lords, under the *Aberdeenshire County Roads Act* of 1865, all tolls had ceased within the county ever since the year 1866, except within the burgh of *Aberdeen*, which was excepted from the operation of that part of the Act. And the view which, as I collect, prevailed with the Lord Justice Clerk was this: he thought the clause was limited to a case of turnpike roads, that is, roads as I understand it, on which tolls were still exigible; and he is no doubt confirmed in that view by the latter part of the clause which relates to such tolls. Taking that view, he also thought, and was right in thinking, that the clause was not in force unless in the particular case to which it refers, of the Act having been adopted or being in force in one county, but not having been adopted and not being in force in an adjoining county, when the turnpike road in question was situated in both counties. Then he considers that in the particular case there was no turnpike road, because, as I understand it, he reads the word "county" as excluding the burgh of *Aberdeen*.

But on the face of this clause the words are "situated in two or more counties (including the burghs wholly or partly within the same"), and, unless there is something else in the Act to control those words, it seems impossible to say that in the particular county of *Aberdeen* they are to have a construction which will except the burgh of *Aberdeen*, whereas, I suppose, in all other counties they will include the burghs great and small. And that difficulty, as it seems to me, is increased rather than otherwise by the definition of the word "county" which we find in this same Act, namely, "'county' shall mean (except where

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otherwise expressly provided) the county exclusive of any burgh wholly or partly situate therein." Therefore, if the word "county" or "counties" had been used alone, clearly the burgh of *Aberdeen* would not have been included. But, to prevent that general interpretation from prevailing, the Legislature has added expressly the words "including the burghs wholly or partly within the same." On what ground can it be contended that those words are not to have effect as to the burgh of *Aberdeen?* Only one ground has been suggested, which is this: that in the same local Act to which I have before referred, the Act of 1865, the burgh of *Aberdeen* is excluded from the general provisions of that Act applicable to the county of *Aberdeen.* Well, that is of course a special interpretation for the purposes of that particular Act: but that is a local Act relating to roads within that county alone: this is a general Act relating to all roads and bridges within all the counties in *Scotland*; and how you can limit the generality of the expressions of this general Act by reference to the particularity of the expressions of a local Act applicable to a single county alone, I fail to see. In the result, therefore, I am unable to adopt the view which appears to have prevailed with the Lord Justice Clerk. I am unable to say that this is not a turnpike road, even in the narrowest sense of the words "turnpike road," namely, a road upon which tolls are or may be by law exacted, partly situated in two or more counties; because I include under the words "county of *Aberdeen*" all "the burghs wholly or partly within the same," and the burgh of *Aberdeen* among the rest.

That view failing, therefore, it is impossible that we can accede to the larger argument presented on the part of the Appellants.

I now come to the argument which is presented on the part of the Respondent; and before I observe upon the terms of the clause, I think it necessary to take notice of what I understand to be its object. The object of this clause, which is the same with that of part of another clause to which reference has been made—clause 37—is to make provision *ad interim* for a peculiar case, the case described in the beginning of the 7th section in these words: "Where it shall happen that this Act has been adopted or is in force," in one of two counties, but not in the other, which have a turnpike road partly situated in one and partly situated in the

other of them. The same case is contemplated under the 37th section: "Where any trust existing at the commencement of this Act embraces a turnpike road which is not situated wholly within one county or burgh." Then it deals first with the case, "Where this Act shall have been adopted" in both of them; and, secondly, it deals with the same case which is contemplated by this 7th section, "Where this Act shall have been adopted or shall be in force in one or more of the counties or burghs in which such road is situated, but shall not have been adopted or shall not be in force in all of such counties or burghs." To me it appears quite clear that these two sections, relating upon the face of them to the same case, must be considered and construed in connection with each other; and that, if any construction can be adopted which shall give full and consistent effect to both of them, that construction is right. Now, the construction adopted in the Court below really disregards that principle. It simply sets aside the 37th section, (apparently as irreconcilable with the 7th,) admitting that there are words in both sections applicable to this case; and yet not attempting to shew how the two can be reconciled with each other.

Now, I understand the real object of this 7th section to be this: to provide during the interval, which cannot be a very long one at the most, before the Act shall be in full force in both the counties, (it being in force in one and not in the other,) for the proper maintenance of the road in the county in which the Act is not in force, and for the proper dealing with the debts which may attach to the road so situated. Those were important objects to be provided for. It is clear that the operation of the local Acts would be disturbed in that state of things. One county having taken out of their operation a certain portion of the road previously subject to it, the local Acts could no longer operate altogether as they had done before, and it might be that what was subtracted from them might materially affect the resources and the means of the local trustees to provide for what was still left in their charge. Under those circumstances nothing was more natural or more probable, than that the Legislature would desire *ad interim* to fortify by some provision or other the means which the previously existing local Acts provided

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of maintaining and keeping up the road and properly providing for the debt; or for that part of the debt, which might attach to that portion of the road to which this Act did not fully apply.

Now, my Lords, that has been done in this way: It is not said that the operation of the Act is to be accelerated—on the contrary, the persons on whom the *ad interim* duty is thrown are neither the existing road trustees, nor those, who, when the Act is in operation, will become the road trustees under the Act; they are the commissioners of supply of the county. I will not enter into the reasons which may have led the Legislature to think that a proper body for the purpose; we must take it as we have it here. Upon them is thrown this *interim* duty, and this *interim* liability; and the question is whether it be such as wholly and altogether to supersede the previous trustees, who are the Pursuers in the present case, or merely to come in aid of the duties imposed upon them and to a certain extent to lighten their responsibilities.

The first observation which I make, upon comparing this clause with the 32nd, is that it is carefully worded so as not to transfer property. The 32nd clause, contemplating the full operation of the Act by adoption or by lapse of time as to any particular road, expressly divests all the property previously vested in the trustees of that particular road, and vests it, by the Act itself, in the future county road trustees to be appointed under the Act. It is clear that the words of this 7th section do not anticipate that operation, or vest any property *ad interim* in the commissioners of supply. What they do is to say, that, in the case contemplated, "any obligation, right, privilege, or duty," not as to everything, but "in regard to the management and maintenance of, and the debt affecting, turnpike roads" in this peculiar situation, which, if the Act had been adopted by both counties, "would have fallen upon or belonged to the county road trustees," of the county which has not adopted it, "shall fall upon or belong to the commissioners of supply," of that county. They are to have cast upon them "any," which I suppose is equivalent to "all," obligations and duties which have relation to the management and maintenance of the roads and to the debt, and nothing else. Of course that would not involve any transfer or vesting of the right to

property. They are also to have, by way of compensation, or as a reciprocal thing, "any" (or all) "right or privilege," still only in regard to management, maintenance, and debt; and that could not carry a transfer of property. Therefore the clause is carefully so worded, whatever its effect may be in other respects, as to leave the property vested in the trustees under the local Acts, which, as I have already said, the previous clauses carefully leave unrepealed and still in force.

Then it goes on to say that these obligations, rights, privileges, and powers are to fall upon and belong to the commissioners of supply in the same way, as, in case of the Act being adopted in the county which has not adopted it, they would have fallen upon or belonged to the county road trustees. Now, supposing that the local trustees who are left in possession of the property are also left in possession of the powers and duties which, under the local Acts, attach to that property, what would be the operation and effect of these words? I think it would be this: they would enable the commissioners of supply to do those things which are necessary under this Act, more especially with reference to debt, which the existing local trustees could not do. They would enable them to exercise the powers of adjustment which the division of the road now makes necessary under the 66th section, and the other sections connected with it which relate to the valuation of debts. Those are important powers. I by no means say that those are all the powers of the Act which it was of importance to extend to roads in this particular situation. It would enable them to do that, and to do it by virtue of the rights, privileges, and duties conferred by this Act; that is to say, those powers which would have been conferred upon the county road trustees if the Act had been adopted, are now conferred upon the commissioners of supply. Furthermore it seems, by throwing an obligation and duty upon the commissioners of supply, to provide an additional guarantee for the maintenance of the roads; that is to say, if they are not properly maintained under the local Acts, the obligation to come in aid and to maintain them, and to provide funds for that purpose, is cast upon the commissioners of supply. That appears from the context; because it goes on to say, "in so far as consisting of or resulting in payments of money, such payments

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shall be a good charge upon, and be defrayed out of, or may be borrowed upon, the credit of the county general assessment." Therefore, as I understand it, this provision, without changing property, without repealing any local Act, without displacing the trustees under it, imposes, so far as relates to debt and so far as relates to management and maintenance, a new obligation and duty, with corresponding rights and privileges, upon the commissioners of supply. The two things are not inconsistent with each other.

And that this was what is really meant seems to me, even without aid from the 37th section, to be made clear from the sequel of this clause itself. If the trustees under the local Act had been superseded, as the present Pursuers sought to have it declared by the Court that they were, if they were no longer to have any duties or any powers or to have anything to do, what could be the meaning of the words, "Wherever in terms of this section any obligation falls upon the commissioners of supply of a county, the trustees of such road" (not the commissioners of supply) "shall, after providing for the expense of managing and maintaining the same" (shewing plainly that that provision was in the first instance to be made by them) "pay over to such commissioners of supply the surplus of income accruing to them from the tolls which, subject to the provisions of this Act, may be exacted on such road." That shews that the toll powers and clauses of the previous local Acts are still to be in force, that those tolls are still to be received by the trustees under the local Acts, and that they are to pay over the surplus after managing and maintaining the roads, evidently in order that the commissioners of supply may have such means as those tolls, or as the surplus of those tolls, would provide for meeting the liabilities cast upon them by the clause—in the first place to meet the debt, and in the second place to meet any charge for management and maintenance, which an insufficiency of the tolls in any subsequent year might possibly throw upon them; a charge which, if the surplus had not been paid over to the commissioners of supply, the trustees of the road would out of the accumulation of such surplus have been able to meet. Therefore, if there were no such section in the Act as the 37th, I should be of opinion, that upon

the face of this section alone that would be the proper conclusion to be arrived at.

It has been suggested, that the section so construed, might have a very narrow and limited operation in point of time; that is to say, that when the county of *Kincardine* in this case adopted the Act, the power on the *Kincardine* part of the road to levy tolls, if there was such a power, would not immediately cease, but would only cease at the date mentioned in one of the clauses of the Act. This, as it appears to me, would not in the least apply to the matter which the 7th section deals with, which is not the *Kincardine* portion of the road but the part within the parliamentary burgh of *Aberdeen*; and the concluding words, that the "trustees shall not be entitled to reduce the tolls exacted thereon without the consent of such commissioners of supply," seem clearly to point to a longer period of duration than that which that argument suggests."

That view is fortified by the 35th section, which says that the tolls shall continue to be exacted, in effect, until the time when the Act comes into operation. And the 37th section, which I referred to before, says expressly and in the plainest terms, that when a road lies in more than one county, and one county has adopted the Act and the other has not adopted it, "the portion of such road within each such county or burgh in which this Act has not been adopted or is not in force, shall continue to be vested in and managed and maintained by the trustees" having the management of the road at the time of the commencement of the Act. The true way of reconciling both clauses, and I may add, of reconciling the first part of the 7th section with the latter part of the same section, is what I have already mentioned. The local Act is not superseded, and in the county which has not adopted the *Roads and Bridges Act* it remains in force. The trustees have still duties and powers—they have the power to levy tolls, they have the duty of applying those tolls as far as they will extend in the proper management and maintenance of the road; but behind them are the commissioners of supply, to whom alone the management of the debt is intrusted, with the new powers as to debt, consequent upon the new situation, which are contained in the Act. Towards the payment of that debt they are to receive from the road trustees the surplus of the tolls, and if the revenue

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arising from the tolls should be insufficient for the maintenance and management of the road, then, in that respect also, a new obligation is laid upon the commissioners of supply, and the county funds in their hands are made liable for the performance of that work.

The conclusion, my Lords, which I arrive at is, that the interlocutors which are appealed from must be reversed; and I propose that your Lordships should make certain declarations which I will read:—[Reads the declarations given below.] With these declarations remit the case to the Court of Session, and order that there should be no costs of the appeal.

LORD BLACKBURN:—

My Lords, I am of the same opinion.

I think the difficulty in the case entirely arises from the Legislature having undertaken a somewhat complicated and difficult task in passing this *Roads and Bridges Act*, and the words of it, perhaps, in some cases not being so carefully selected as they might have been in order to express exactly what was meant, without there being any possibility of their expressing more than was meant. The great object of the Act was to say that after a time there should be in *Scotland* no more tolls or statute labour, but that all roads should be managed in a particular way. It did not, however, seem fit to the Legislature that that scheme should come into operation at one time for the whole country; it was left to be adopted by each county including the burghs therein. The county was to be the unit which was to adopt the Act or not to adopt it, and each county might adopt it at the time that it pleased. That was one part of the Act.

Then, by the 4th section, it was provided that where there was any turnpike road or statute labour road partly situated in any county in which tolls or statute labour were not abolished, any statute relating to it "shall continue in force until the 1st day of June, 1883, and no longer, unless in the meantime this Act shall be adopted, or tolls and statute labour shall be legally abolished in such county," and from the time that such local Acts are put an end to, this Act "shall commence to have effect therein." Now it certainly strikes me that it was superfluous, where a turnpike

trust or a statute labour road went into a county, to add the qualification "in which tolls and statute labour, or either thereof, have not been abolished," for I think the very fact that the trust of that particular turnpike road or that statute labour road lay in that county would be enough to shew that tolls and statute labour had not been totally abolished in that county, otherwise how could the Act have applied there at all? However there is no harm in them—the meaning is plain enough.

It is to be observed, further, that it expressly says here that the county includes "the burghs wholly or partly within the same." Now in the particular case we have to deal with, of the *Wellington Bridge*, the two *Wellington Bridge* Acts relate to a bridge and a road with tolls on it which lies partly in the county of *Kincardine* and partly in the county of *Aberdeen*, including the burgh of *Aberdeen*. I say nothing of the minor point that was suggested, namely, that a part of the suspension bridge—the part that hangs in the air—is in the county of *Aberdeen*, but outside the burgh of *Aberdeen*. I do not quite know how that may be. I pass by that. I will suppose that it belongs to a trust which is partly in the burgh of *Aberdeen*, and therefore in the county of *Aberdeen*, because the burgh is included in the county, consequently situated undoubtedly in the county of *Aberdeen* ("including the burghs wholly or partly within the same"), the local Act must, as far as I can perceive under the 4th section, necessarily come to an end on the 1st of June, 1883, and then, if not sooner, this *Roads and Bridges Act* will be brought into operation throughout the county of *Aberdeen*.

It was argued that it would not do so because of the way in which the previous legislation had dealt with the *Aberdeenshire* roads, and it was contended that that had had the effect of abolishing tolls and statute labour roads throughout the whole of the county of *Aberdeen*. But it had not really done so, whatever the parties may have supposed. In 1865, when the *Aberdeenshire Road Act* was passed, this Act of 1878 was not contemplated, and although it was expressly said in the Act of 1865 that in the county of *Aberdeen* (which for the purposes of the Act included all burghs within it except the burgh of *Aberdeen*), the various trusts named were all abolished, yet it is plain enough that that

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Wellington Bridge and road trust which was in the burgh of *Aberdeen*, and so in the county, was not abolished, nor was it intended to be touched at all.

Then, my Lords, it being plain therefore that this was a trust which ultimately in 1883, if not earlier, would come under the operation of the Act and be abolished, it was necessary to provide in 1878 what was to be done with the debt upon that trust, and what was to be done with reference to the burden of maintaining the road in the future. As to both of those the Legislature had to make provision in the *Roads and Bridges Act*, and the provision they had to make was a little complicated. It was quite possible, in fact it is what has happened, that the county of *Kincardine* might adopt the Act at once. I suppose they adopted it very quickly, for I see that this summons was issued in September, 1879, and therefore the county of *Kincardine* must have adopted the Act almost immediately after it was passed. When the Act was being passed it was evident that one county might adopt it at once as the county of *Kincardine* did, but that another county, like the county of *Aberdeen*, might not adopt it at all, and consequently the trusts in that county would be thrown over until June, 1883, a period of nearly five years from the passing of the Act; and during that time something had to be done about the management of the roads, something had to be done about the payment of interest to creditors, and, when the Act was in operation in both counties something would still have to be done as to dividing and apportioning the debt upon the two portions of road between the two counties, or the county and the burgh—all that had to be provided for.

Now sect. 7 is, I think, to be taken in company with sect. 37. There is an appearance as if there had been additions made to sect. 7 without those who made them thinking sufficiently what they were about—but there is nothing that I can see that is inconsistent, and nothing to which full force cannot be given. Sect. 7 was mainly intended to say, when once it is ascertained that the turnpike road trust under the local Act is to be at an end in one county and not at an end in the other, then, during the interval, inasmuch as the tolls would cease to be exigible in the part where it had been abolished, the debt upon that portion

must be provided for somehow; and the scheme of the Act is that it shall be provided for by being paid by that county which has adopted the Act and so abolished the tolls. Then came the question how is it to be apportioned, how much are they to have, and how much is to belong to the other body. Somebody must be provided in the meanwhile to pay the interest upon the portion of the debt which belonged to the other county which had not yet adopted the Act. Somebody or other must provide the means of maintaining the road during that time. The first scheme of the Act seems to have been this; so far as regards that dividing of finances, and saying how much of the debt should belong to the one, and how much to the other, and so far as regards paying interest upon the portion which is in the county which has not adopted the Act, we will throw that upon the commissioners of supply; but so far as regards the maintenance of the road we will leave that with the old trustees until their Act ceases to be in operation. Then when we come to sect. 37 we find provisions as to how they are to divide it afterwards amongst them.

It looks as if for some reason or other it had been thought that it was not sufficiently provided for in that way, and consequently by sect. 7 there is a further duty cast upon the commissioners of supply—they are not only to look after the debt, but they are also (this is the way I am obliged to construe it) to have cast upon them "any obligation, right, privilege, or duty in regard to the management and maintenance of, and the debts affecting" the roads as well. I cannot construe that in any other way than as saying that if the roads are not otherwise maintained and managed they are to have the duty of doing it, and they must do it. But that is not at all inconsistent with the other body retaining the power and the duty to maintain and to manage the roads. Although there is thus given to the commissioners of supply an interest and a duty of superintendence, and the power to see that the local trustees do their duty, and although in case they should not succeed in making them do their duty, the commissioners of supply must themselves supplement their work and do it themselves, I do not see that there is anything in that inconsistent with the provision which follows immediately afterwards, that "the trustees of such road" (in this case the *Wellington Road*)

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"shall, after providing for the expense of managing and maintaining the same, pay over to such commissioners of supply the surplus of income accruing to them from the tolls, which subject to the provisions of this Act may be exacted on such road; and the said trustees shall not be entitled to reduce the tolls exacted thereon without the consent of such commissioners of supply."

Lord Blackburn.

Had sect. 7 simply given to the commissioners of supply an obligation and a duty to see that the debt was paid, nobody could have doubted upon reading it that it meant, the turnpike trustees shall continue to levy the tolls and continue to maintain the road and shall hand over the surplus to the commissioners of supply, who shall apply it in keeping down the interest and paying it until such time as the Act comes into operation, when the other provisions of the Act will come into effect and apply to that road. Now, although it is a little clumsily worded as it stands, I do not think there is really anything inconsistent in the two provisions standing together. I think it may very well be that the commissioners of supply have an obligation to see that the road is properly maintained, and have consequently the power to insist upon the turnpike road trustees doing their duty in maintaining it, raising a revenue for the purpose and paying over the surplus, and yet the trustees may be under the same obligation still to do it themselves, though, if they should make default in it either from disability or misconduct, the persons interested in having the road kept in good order may have a right to come upon the commissioners of supply and call upon them to do it.

Taking that view of the effect of the Act, it seems to me that the interlocutor is defective (I need not go through it further), exactly in those particulars which the noble and learned Lord on the woolsack has already pointed out as being defects in it. I think the interlocutor as it at present stands would abolish the tolls altogether, and consequently prevent the trustees of the turnpike road from levying tolls. It gives no power to the commissioners of supply, nor do I see that the Act gives any power to the commissioners of supply to levy tolls, and it would thereby cast the duty upon the commissioners of supply of *Aberdeenshire* to pay out of the county funds of *Aberdeenshire* what is required for the maintenance of the road up to the 1st of June, 1883,

or such earlier time as the Act may be adopted in *Aberdeenshire*. I do not think that that is what the Act intended, nor do I think it is reasonable or just. On the other hand, I think that the trustees of the *Wellington Road* are expressly declared in the enactment to be freed from the obligation to pay the debt further than that they are to hand over the surplus of their tolls to the commissioners of supply of *Aberdeenshire*, who are to pay that portion of the debt of the road trustees up to the time when *Aberdeenshire* shall adopt the Act, in which case it will be transferred to the burgh or county trustees, as the case may be: and in the case of the other county, *Kincardineshire*, they are also freed from seeing to the debt, for that has fallen upon the county of *Kincardine*. Consequently, as it seems to me, the present interlocutor is wrong in that respect, and I think that should be set right. The declarations which have been read to your Lordships seems to me to be all right. I also agree that, as in this result there is partial success but not total success on either side, there should be no costs of the appeal on either side.

LORD WATSON:—

My Lords, I agree in the construction which your Lordships have put upon those provisions of the *Roads and Bridges (Scotland) Act*, 1878, which have been brought into controversy in the present case. It appears to me that the first and perhaps the most important question to consider in regard to these statutory provisions is, whether the county of *Aberdeen* is a county in which tolls have not been abolished within the meaning of the 4th and 7th sections of the Act; because, if it be a county in which tolls have not been abolished, then undoubtedly the duty of maintaining the roads will eventually rest upon the statutory body to be constituted under the provisions of the Act.

Now, my Lords, the only suggestion made as against the construction that *Aberdeenshire* is a county in which tolls have not been abolished is, that there is a private Act by which the county and the burgh have been separated so far as regards management, and it is contended that because the only turnpike road still existing is to be found within the limits of the burgh and not within the limits of the county as defined in that private Act,

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you must read this statute as enacting that *Aberdeenshire* is a county in which no tolls exist. My Lords, I do not think it is possible to import into this general statute that definition of the word "county," seeing that its interpretation clause enacts that "county" shall mean the county exclusive of the burghs, except in cases where it is expressly provided to the contrary. Now in the 4th and 7th sections the county to which the provisions of each section apply is described as the county including the burghs within it—*Aberdeenshire* unquestionably includes the burgh of *Aberdeen*; the burgh of *Aberdeen* includes *Wellington* turnpike road; and therefore it appears to me to be clear that for the purposes of these two sections *Aberdeenshire* is a county in which there has not been a complete abolition of tolls. The result is plainly that the *Turnpike Act*, which according to its natural course would endure until the year 1891, must cease and determine on the 1st of June, 1883. Upon its so ceasing and determining, under the provision of sect. 4 it is plain that the Act of 1878 shall, unless Parliament otherwise provides, commence to have effect in the county of *Aberdeen*.

But in this case, the turnpike road extends from the burgh of *Aberdeen* across the *Dee* and into the neighbouring county of *Kincardine*. It is one trust under one statutory management. The county of *Kincardine* by adopting the provisions of the *Roads Act* have got rid of the tolls, and if the effect of their adopting the Act were to destroy the provisions of the *Turnpike Roads Act* as regards that part of the road which is locally situated in *Aberdeenshire*, then I apprehend the provisions of the general Act would have come into effect at once and the present statutory management in *Aberdeenshire* under the Act of 1865 would have been succeeded by a statutory management under the general Act of 1878. But provision is made for that case and against that result occurring in the same sect. 4, which provides that "where any Act relates to a turnpike road which is situated in more than one county, notwithstanding that such Act has ceased in terms of this Act to be in force in one county in which such road is situated, it may nevertheless continue to be in force in the other county or counties in which such road is situated." The effect of that enactment plainly is to keep up the provisions of

that local statute, the *Wellington Bridge Act*, within the county of *Aberdeen* until the 1st of June, 1883, unless Parliament shall interfere by previous legislation, or unless the body to whom that option is competent shall previously adopt the provisions of the *Roads and Bridges Act*. It appears from the terms of the 52nd section of the Act of 1865 that powers are conferred upon the burgh management to arrange with the county of *Kincardine* for the abolition of the tolls along that road; and looking to the terms of sub-sect. 1 of sect. 6, it occurs to me that the trustees of *Aberdeenshire* under the Act of 1865, and not the commissioners of supply, are now the body to whom that option belongs. But be that as it may, the result of sect. 4 is that, unless it be superseded, either by the adoption of the general statute or by legislation, the local *Bridge Act* must endure until the 1st of June, 1883, and at that date the *Roads and Bridges Act* will come into force within the county and also within the burgh of *Aberdeen*.

Now my Lords the provisions of the statute with which we are concerned in this case relate to the interim arrangements which are made by it for the maintenance of that portion of the turnpike road remaining in the county of *Aberdeen*, which is now detached from that portion of it which is in the county of *Kincardine*. The road trustees of *Kincardineshire* will take charge of it to the south of the *medium filum* of the *Dee*; but there might be great difficulty, were it not for the provisions of the statute to which I have referred, and which your Lordships have criticised, in determining what is to be the course of management of the northern portion, between the adoption of the Act in *Kincardineshire*, and the time of the Act coming into compulsory force in *Aberdeenshire* in 1883. The general enactment of sect. 4 is, that the Act shall continue as regards that portion of the road which is in *Aberdeenshire*, and I apprehend that that reservation would of itself keep alive the existing trust body with all their powers and all their privileges so far as is necessary for performing their statutory duties in regard to the residuum of road which is left under their charge. But that is made more clear by sub-sect. 2 of the 37th section of the statute, which provides that they shall continue in the management until relieved of it by the adoption

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of the general Act. And there is further a proviso in the end of the 7th section to the effect that, if in the course of that management there shall arise surplus income, it must be paid over to the commissioners of supply. Now my Lords, it humbly appears to me that this being a county in which tolls have not been abolished within the meaning of sect. 7 the whole provisions of that Act apply, and that the commissioners of supply of *Aberdeenshire* are liable *subsidarie* for the expenses of management and wholly for the burden of the debt so far as that debt, when duly apportioned, rests or would rest upon the county of *Aberdeen*, if partition had been made upon the footing that the Act had been adopted in both counties.

The only argument I have heard against the continued existence of the trust and the actings of the trustees in the administration of the trust, until 1883, has arisen from this. It is argued on the part of the Respondent that the powers and privileges, or the rights and privileges given to the commissioners under sect. 7, are so wide as to be inconsistent with the endurance of any right of management on the part of the road trustees. But my noble and learned friend who moved the judgment of the House has pointed out that there is no transfer of the property, no transfer of the rights vested in these trustees; and certainly that suggests the continuance of the whole machinery of the trust. I apprehend that it was necessary to confer upon the commissioners of supply certain powers of administration and management, because annually or half yearly, as the case may be, if the trustees have surplus income, they are to hand it over to the commissioners of supply. The result of their management may, however, be to leave a deficit during any yearly or half-yearly period, and in order to enable them to implement their statutory duties, the burden is cast upon the commissioners of raising, by assessment, funds sufficient to keep the road in repair. The burden laid upon the commissioners of supply must necessarily be merely temporary, because the same clause which imposes the duty of assisting in the maintenance of the road and of settling in the meantime with the county of *Kincardine* for the proportion of debt which must be borne by *Aberdeenshire*, provides that they

shall be relieved of their obligations by the statutory body of trustees constituted by the Act as soon as it comes into existence.

Upon these grounds, I entirely concur with the judgment which has been proposed to be pronounced by your Lordships.

JUDGMENT:—*Ordered and Adjudged*, That the said interlocutors complained of in the said appeal be, and the same are, hereby reversed:

And it is declared, That the true effect of the *Roads and Bridges (Scotland) Act*, 1878, is to continue in force the provisions of the Acts 10 Geo. 4, c. 43, and 23 Vict. c. 26, so far as relates to the powers and duties thereby imposed upon the Pursuers for the management and maintenance of that part of the bridge and road mentioned in the record which is within the county and parliamentary burgh of *Aberdeen*, together with the powers of demanding and taking tolls or pontage within the county and the parliamentary burgh of *Aberdeen* conferred by such Acts, so long as the said *Roads and Bridges Act* shall not be in force in the county and parliamentary burgh of *Aberdeen*, and that so far, and so far only, as the Pursuers may fail in the proper performance of such duties of management and maintenance, or as the receipts from such tolls as aforesaid may be insufficient to provide for the same, the Appellants (the commissioners of supply for the county of *Aberdeen*) are likewise bound to maintain and keep in proper repair the said bridge and road within the said county and parliamentary burgh: And that under and by virtue of the said *Roads and Bridges (Scotland) Act*, 1878, the liability of the Pursuers to the debts incurred by them as trustees under the said Acts of 10 Geo. 4 and 23 Vict. has now ceased, and has fallen upon and now belongs to the county road trustees of *Kincardine* and the Appellants, the said commissioners of supply for the county of *Aberdeen*, severally in the proportions to be fixed and adjusted under the provisions of the said *Roads and Bridges Act*: And that the said commissioners of supply for the county of *Aberdeen* are entitled to receive from the Pursuers all surplus of income accruing to the Pursuers from the tolls which may be exacted on the said bridge or road within the said county and parliamentary burgh of *Aberdeen*, after providing for the expense of managing and maintaining the said bridge and road: And that the Pursuers are and will be entitled to be freed and relieved by the said commissioners from the proportion of the debts aforesaid belonging, under the provisions of the said *Roads and Bridges Act*, to the county and parliamentary burgh of *Aberdeen*, until the time when the said *Roads and Bridges Act* shall be in force in the

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said county and parliamentary burgh of *Aberdeen*, the Pursuers paying over such surplus income, if any, to the said commissioners of supply for the county of *Aberdeen*: And it is declared, that so far as relates to that part, and that part only, of the said bridge and road which is within the county of *Kincardine*, the said Acts of 10 Geo. 4 and 23 Vict. have ceased to be in force, and the Pursuers have ceased to be under any obligation or duty, or to have any right or privilege in respect thereof: And that the said county road trustees of *Kincardine* are bound to maintain and keep in proper repair that part of the said bridge and road which is within the county of *Kincardine*; and to free and relieve the Pursuers from the proportion of the said debts belonging, under the provisions of the said *Roads and Bridges Act*, to the said county of *Kincardine*: And it is ordered, That the cause be, and the same is, hereby remitted back to the Court of Session in *Scotland* to do therein as shall be just and consistent with these declarations and this judgment.

Lords' Journals, May 17, 1881.

Agents for Appellants: *Marlin & Leslie.*
Agents for Respondent: *Simson & Wakeford.*

END OF VOL. VI.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1881, will be as follows:—

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AUSTRALIA, LAW OF — *Conflict of Laws — Liability of Foreign Corporation—Lex Loci Contractûs.*] *Held*, that the *Western Australian Joint Stock Companies Ordinance Act*, 1858, does not apply to foreign corporations or to companies incorporated out of *Western Australia* and properly and lawfully carrying on business as such. Consequently a limited company incorporated elsewhere, not having complied with its provisions, can nevertheless carry on business and make contracts in *Western Australia* by its agent without its members being liable individually for its debts and engagements.—*Held*, further, that a company duly registered and incorporated in *Victoria* could not be again registered as a company in *Western Australia*.—*Bulkeley* v. *Schutz* (Law Rep. 3 P. C. 764) approved. BATEMAN *v.* SERVICE - - - - - 386

AVERMENT—Pleading - - - 156
See SLANDER.

BANKER—*Mortgage—Deposit of Title Deeds with Bank—Banker's Lien—Loan by equitable Mortgagee after Notice of Contract of Sale—Vendor and Purchaser—Lien of Unpaid Vendor.*] The owner of land, after depositing the title deeds with a bank as security for all sums then or thereafter to become due on the general balance of his account with the bank, contracted with the knowledge of the bank to sell the land to one who had notice of the terms of the deposit. The vendor afterwards paid into his own account at the bank sums which in the whole exceeded the debt due to the bank on his balance at the time of the contract of sale, so that on the principle of *Clayton's Case* (1 Mer. 585) that debt was discharged. The bank, without giving notice to the purchaser, continued the account and made fresh advances to the vendor, so that on the general balance there was always a debt to the bank. The purchaser, who never had notice of the fresh advances, paid the purchase-money by instalments to the vendor:—*Held*, affirming the decision of the Court of Appeal, that on the principle of *Hopkinson* v. *Rolt* (9 H. L. C. 514), the bank had no charge on the land as against the purchaser for the fresh advances.—*Held*, also, that the bank had no charge upon the purchase-money.—*Per* Lord *Blackburn*: A purchaser of land, with notice that the title deeds have been deposited with a bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the bank has after notice of the purchase made fresh advances. The burden lies on the bank advancing on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends so to do. LONDON AND COUNTY BANKING COMPANY *v.* RATCLIFFE - - 722

BANKRUPTCY Scotch—Delivery before bankruptcy - - - - 588
See SCOTCH LAW. 2.

—— Trustee - - - - - 482
See PRACTICE.

BILL OF EXCHANGE—*Forgery—Silence—Adoption of Signature—Estoppel.*] A person who knows that a bank is relying upon his forged signature to a bill, cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel. The names of *A.* and *B.* appeared on a bill as drawers and indorsers to the *B. L. Co.* The *B. L. Co.'s Inverness* bank discounted it for *C.*, who signed it as acceptor. They had had no previous dealings with *A.* or *B.*. Being dishonoured when due, notice to that effect was sent to *A.* and *B.*, and received late on a Saturday, but they did not communicate with the bank. On the following Monday, being the 14th of April, *C.* brought to the *B. L. Co.* a blank bill with *A.* and *B.'s* names as drawers and indorsers, apparently in the same handwriting as the previous bill. It was agreed to accept it as a renewal of the previous bill but for a less amount, the difference being paid in cash by *C.* Three days before it was due, notice was sent to *A.* and *B.*, and again when it was dishonoured, and then through the *B. L. Co.'s* law agent. A fortnight after the first notice the *B. L. Co.* were informed for the first time that *A.* and *B.'s* signatures were forgeries, and they declined to pay the amount in the bill. *A.* alleged that he called on *C.* on the 14th of April about the first bill, that *C.* admitted that he had forged his name, handed him the bill, and solemnly assured him that it had been taken up by cash; and so assured he did not think it necessary to communicate with the bank. He admitted that on that day he drank with *C.* and borrowed £4 of him. He denied positively any knowledge of the second bill until he received the bank notices. *C.* was convicted of the forgery. The *B. L. Co.* charged *A.* with payment of the bill on the ground that he had either authorized the use of his name, or had subsequently adopted and accredited the bill, and therefore was estopped from denying his liability:—*Held*, reversing the decision of the Court below, that in the facts proved *A.* had neither authorized nor assented to the use of his name; nor did the circumstances of the case raise any estoppel against him.—*Dictum* of *Parke*, B., as to estoppel in *Freeman* v. *Cook* (2 Ex. 654), approved of. M'Kenzie *v.* British Linen Company - - - - 82

2. —— *Indorser — Surety — Securities.*] The acceptor of a bill of exchange knows that, by his acceptance, he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder, and, having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor.—He is so entitled whether at the time of his indorsement he knew, or did not know, of the deposit of those securities.— The surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship.—*S. C. R.*, one of the partners of *S. R. & Sons*, in December, 1874, deposited with the *N. & S. W. Bank* the

BILL OF EXCHANGE—*continued.*

title deeds of two of his own freehold properties, and signed a memorandum acknowledging them to be deposited as securities for what the *N. & S. W. Bank* might advance to the firm in the way of discounts.—In November, 1875., *D. & Co.* sold to *R. & Sons* a cargo of corn to be paid for in cash. Cash was paid only for part. *R. & Sons* offered a bill of exchange for the rest, which was declined. *D. & Co.* were customers of the *N. & S. W. Bank*. *R. & Sons* said if *D & Co.* would inquire of those bankers they would find it would be all right with the *R.* bills. The bank manager refused to discount the bill without the indorsement of *D. & Co.*, but said than he believed *D. & Co.* would incur no more than a nominal liability by putting their names on the bill. *D. & Co.* thereupon consented to take the bill, indorsed it in the ordinary way, and it was discounted by the bank and carried to their credit. In January, 1876, *R. & Sons* stopped payment. The bill became due in February, and was dishonoured. *D. & Co.*, who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on *R. & Sons'* bills, brought an action against the *N. & S. W. Bank* to have the benefit, so far as they would go, of the securities deposited in December, 1874, claiming to be sureties to the bankers for what was due upon the bill.—*Held*, that *D. & Co.* were sureties on the bill, and that as such they were entitled to the benefit of these securities. Duncan, Fox & Co. *v.* The North and South Wales Bank 1

BRITISH HONDURAS — Adverse possession Against the Crown - - 143
See Honduras, Law of.

CANADA, LAW OF—*Law Reform Act (Ontario)* —38 *Vict. c.* 11 (*Canada*), *s.* 22—*Jurisdiction of Court of Queen's Bench and Supreme Court—Rule to set aside Verdict—Misdirection—New Trial.*] Upon a rule *nisi* calling upon the Plaintiff in an action upon a policy of life insurance to shew cause why a verdict obtained by her should not be set aside and a nonsuit or verdict entered for the Defendant pursuant to the *Law Reform Act*, or a new trial had between the parties, said verdict being contrary to law and evidence, and the finding virtually for the Defendant; and for misdirection in that the jury had not been directed on the evidence to find for the Defendant; the Court of Queen's Bench for *Ontario* ordered the verdict for the Plaintiff to be set aside and the same to be entered for the Defendant, while the Supreme Court eventually reversed this order and restored the verdict for the Plaintiff, being of opinion that they had no power to direct a new trial on the ground of the verdict being against the weight of evidence.—*Held*, that although the Court of Queen's Bench would have had power to enter the verdict in accordance with what they deemed to be the true construction of the findings coupled with other facts admitted or beyond controversy, they had no power to set aside the verdict for the Plaintiff and direct a verdict to be entered for the Defendant in direct opposition to the finding of the jury on a material issue.—Under 38 Vict. c. 11 (*Canada*), the Supreme Court has power to make any order or to give any judgment

CANADA, LAW OF—*continued.*
which the Court below might or ought to have given, and amongst other things to order a new trial on the ground either of misdirection or the verdict being against the weight of evidence; and that power is not taken away by sect. 22 in this case, in which the Court below did not exercise any discretion as to the question of a new trial, and where the appeal from their judgment did not relate to that subject.—Although the Privy Council have the right, if they think fit, to order a new trial on any ground, that power will not be exercised merely where the verdict is not altogether satisfactory, but only where the evidence so strongly preponderates against it as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it. Connecticut Mutual Life Insurance Company of Hertford *v.* Moore **644**

CASES—*Beevor* v. *Luck* (Law Rep. 4 Eq. 537) commented on - - - **698**
See Mortgage. 1.

—— *Bland* v. *Ross* (*The Julia*) (Lush. 231; 14 Moo. P. C. 210) commented on and approved - - - - **217**
See Ship. 2.

—— *Bower* v. *Peate* (1 Q. B. D. 321) approved
See Support. 1. [**740**

—— *Bulkeley* v. *Schutz* (Law Rep. 3 P. C. 764) approved - - - - **386**
See Australia, Law of.

—— *Clayton's Case* (1 Mer. 585) recognised **722**
See Banker.

—— *Freeman* v. *Cook* (2 Ex. 654) *dictum* of Parke, B., in, approved - - - **82**
See Bill of Exchange. 1.

—— *Garland, Ex parte* (10 Ves. Jun. 110) followed
See Scotch Law. 14. [**855**

—— *Hebbert* v. *Purchas* (Law Rep. 4 P. C. 301) approved - - - - **424**
See Ecclesiastical Law. 2.

—— *Hopkinson* v. *Rolt* (9 H. L. C. 514) followed
See Banker. [**722**

—— *Knowles* v. *McAdam* (3 Ex. D. 23) disapproved - - - - **315**
See Scotch Law. 4.

—— *Martin* v. *Mackonochie* (Law Rep. 3 P. C. 409) approved - - - **424**
See Ecclesiastical Law. 2.

—— *Tassell* v. *Smith* (2 De G. & J. 713; 27 L. J. (Ch.) 694) overruled - **698**
See Mortgage. 1.

—— *White* v. *Hillacre* (3 Y. & C. (Ex.) 597) approved - - - - **698**
See Mortgage. 1.

CEYLON, LAW OF—*Ceylon Ordinances, No.* 8 *of* 1834, *No.* 22 *of* 1871—*Adverse Possession—Acts of Ownership.*] *Ceylon* Ordinances No. 8 of 1834, and No. 22 of 1871, require that a Defendant should have had ten years' undisturbed and uninterrupted possession, meaning actual and not ideal possession, of land in dispute in order to be entitled to the benefit of such Ordinances. Although acts done upon parts of a district of land may be evidence of possession of the whole, yet as regards lands within a disputed boundary

CEYLON, LAW OF—*continued.*
acts of ownership by either party outside the boundary are no evidence of title to the lands within it. Clark *v.* Elphinstone - - **164**

2. —— *Presumption of Marriage—Onus Probandi.*] According to the Roman-Dutch law there is a presumption in favour of marriage rather than of concubinage. According to the law of *Ceylon*, as in *England*, where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage. Where it is proved that they have gone through a form of marriage, and thereby shewn an intention to be married, *held*, that those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies have been performed. Sastry Velaider Aronegary *v.* Sembecutty Vaigalie **364**

CEYLON, ORDINANCE No. 8 of 1834 and No. 22 of 1871 - - - - **164**
See Ceylon, Law of. 1.

CHANCERY COURT OF YORK - - **657**
See Ecclesiastical Law. 1.

CHARTERER—Duties of - - - **38**
See Ship. 1.

CHARTERPARTY - - - - **38**
See Ship. 1.

CLYDE NAVIGATION - - - **273**
See Scotch Law. 10.

COAL MINE—Income tax - - - **315**
See Scotch Law. 4.

COHABITATION—Scotch marriage - - **489**
See Scotch Law. 6.

COLONIAL LAW—*Australia* - - - **386**
See Australia, Law of.

—— *British Honduras* - - - **143**
See Honduras, Law of.

—— *Canada* - - - - - **644**
See Canada, Law of.

—— *Ceylon* - - - - **164, 364**
See Ceylon, Law of. 1, 2.

—— *Natal* - - - - - **619**
See Natal, Law of.

—— *New Brunswick*—Law of - - **373**
See New Brunswick, Law of.

—— *New South Wales* - - - **628, 636**
See New South Wales, Law of. 1, 2.

COMMON—Land for recreation - - **833**
See Scotch Law. 11.

COMPANY—Foreign corporation - - **386**
See Australia, Law of.

COMPOUND INTEREST - - - **181**
See Mortgage. 2.

COMPULSORY PILOTAGE - - - **217**
See Ship. 2.

CONDITION — Feu charter—Right of co-feuar to enforce - - - - **560**
See Scotch Law. 3.

CONDITIONS OF SALE—Lands forfeited to Crown
See New South Wales, Law of. 2. [**628**

CONFLICT OF LAW—Foreign corporation **386**
See Australia, Law of.

CONSENT—Action—Strangers to act - 560
See Scotch Law. 3.
—— Scotch marriage—Evidence - - 489
See Scotch Law. 6.
CONSOLIDATION—Mortgages - - 698
See Mortgage. 1.
CONSTRUCTION OF STATUTE - - 114
See Scotch Law. 13.
CONTRACT—Sale of goods—Unfinished article—Scotch law - - - - 588
See Scotch Law. 2.
CONTRACTOR—Liability of principal - 740
See Support. 1.
CONTRIBUTORY NEGLIGENCE—Damage to ship
See Ship. 2. [217
CONTUMACY—Ecclesiastical law - - 657
See Ecclesiastical Law. 1.
COSTS—Appeal - - - - 833
See Scotch Law. 11.
—— Trustee in bankruptcy - - - 482
See Practice.

CRIMINAL LAW — *Indictment — Two Counts — Misdemeanor—General Verdict—Second Term of Imprisonment beginning at the end of the First.*] An indictment for perjury contained two counts, charging perjury to have been committed by the Defendant on two different occasions, one in the progress of a trial, the other in an affidavit in Chancery. Both acts of perjury had the same object in view:—*Held*, 1. That they were distinct offences, and a punishment might be inflicted in respect of each.—2. That though the offences were in this way distinct, they might both be included in the same indictment, and that a general finding of guilty on the charges contained in both counts was good.—3. That the full punishment of seven years' penal servitude might be inflicted for each offence, and that the second term of penal servitude was properly made to begin at the termination of the first term.—4. The 2 Geo. 2, c. 25, s. 2, authorizes the Judge before whom a person shall be convicted of perjury, to order such person to be sent to a house of correction for seven years, there to be kept to hard labour; "and thereupon judgment shall be given that the person convicted shall be committed accordingly, over and beside such punishment as shall be adjudged to be inflicted upon such person, agreeable to the laws now in being:"—*Held*, that this statute did not impose on the Court the necessity of awarding any punishment previous to that of penal servitude, so as to give the sentence of penal servitude the form of an additional punishment.—The conclusion to a count "*contra formam statuti*" is now, by 14 & 15 Vict. c. 100, s. 24, no longer necessary. Castro *v.* The Queen [229

CROWN—Adverse possession against - 143
See Honduras, Law of.
—— Reservation of rights of—Prolongation of patent - - - - 174
See Patent. 1.
—— Servants of—Liability - - - 619
See Natal, Law of.
CROWN LANDS—*New South Wales* - 628, 636
See New South Wales, Law of. 1, 2.
DECEASED PERSON—Statements of - 489
See Scotch Law. 6.
DEDICATION—Land to public purposes - 636
See New South Wales, Law of. 1.
DEFAMATION - - - - 156
See Slander.
DELAY—Ship—Discharge of cargo - - 38
See Ship. 1.
DELIVERY—Before bankruptcy—Scotch law
See Scotch Law. 2. [588
DEMURRAGE - - - - - 38
See Ship. 1.
DEPOSIT OF DEEDS—Banker - - 722
See Banker.
DICTATION—Written agreement—Scotch law
See Scotch Law. 5. [340
DOCKS—Entering—Arrival at port - - 38
See Ship. 1.

EASEMENT - - - - - 740
See Support. 1.

ECCLESIASTICAL LAW—*Chancery Court of York—Contumacy—Writ de contumace capiendo—Mittimus—County Palatine of Lancaster—Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 9, 13—5 *Eliz. c.* 23, *ss.* 2, 11—53 *Geo.* 3, *c.* 127, *s.* 1—2 & 3 *Will.* 4, *c.* 93, *s.* 1—*Rules of Supreme Court, Order* II., *rule* 8.] A representation having been made against a clerk, rector of a parish within the county palatine of *Lancaster*, in the province of *York*, under the *Public Worship Act*, 1874, for offences against sect. 8 of that Act committed in the parish church, the bishop of the diocese sent the matter to the Archbishop of *York*, who sent a requisition to Lord *Penzance*—the judge appointed under the Act, who had since the passing of the Act become official principal of the Chancery Court of *York*—requiring him to hear and determine the matter of the representation at any place in *London* or *Westminster*, or within the province of *York* or diocese of *Manchester*, as he might deem fit. The Judge heard it at *Westminster*, and there pronounced judgment and issued a monition ordering the clerk to abstain from the practices complained of. The clerk having disobeyed the monition the Judge, sitting at *Westminster*, issued an inhibition inhibiting the clerk for three months and thereafter until relaxation from performing any service of the church within the diocese, and on his persisting in his disobedience, pronounced him contumacious and issued a *significavit* under 53 Geo. 3, c. 127, s. 1. The tenor of the *significavit* was sent by *mittimus* from the Petty Bag Office to the Chancellor of the county palatine of *Lancaster*. In accordance with an order made by the Vice-Chancellor of the county palatine sitting at *Lincoln's Inn* a writ *de contumace capiendo* was issued, under which the clerk was arrested by the sheriff of *Lancashire* and lodged in *Lancaster Gaol*. On a motion for *habeas corpus*:—*Held* (affirming the decision of the Court of Appeal), that the matter so heard before the Judge, as official principal of the Chancery Court of *York*, was a cause cognizable in an Ecclesiastical Court within the meaning of 53 Geo. 3, c. 127, s. 1, and that the Judge had power to pronounce the contumacy and issue the *sig*

ECCLESIASTICAL LAW—*continued.*

ficavit under that Act:—That the county palatine being one of the exempt jurisdictions mentioned in 5 Eliz. c. 23, s. 11, the procedure required by that section as to the *mittimus* and the issue of the writ *de contumace capiendo* was applicable and was duly followed:—That the *mittimus* was not one of the writs referred to in Order II., rule 8, of the Rules of the Supreme Court, and was properly tested as in the name of the Queen by the Master of the Rolls:—That under the *Public Worship Regulation Act*, 1874 (37 & 38 Vict. c. 85), s. 9, the Judge had power not merely to "hear" but also to hear and determine the matter, and to do all the acts which he did at *Westminster*:—That all the proceedings were regular and there was no ground for a *habeas corpus*. Green *v.* Lord Penzance - - - - 657

2. —— *Prohibition — Definitive Sentence — Monition—Subsequent Enforcement of the Monition.*] In 1874 a suit was instituted by letters of request in the Arches Court, according to the provisions of the 3 & 4 Vict. c. 86 (the *Church Discipline Act*) against a clerk for unlawful practices in the performance of divine service. A sentence of suspension *ab officio* for six weeks was pronounced against him, and he was "monished" not to repeat the practices. He did repeat them, and was again admonished. He continued to repeat them, was twice summoned before the Court to answer, but did not appear; and in June, 1878, the Dean of the Arches "pronounced, decreed, and declared" that the acts alleged to have been done by the clerk, had been fully proved, "and that in so doing he had repeated the offences alleged against him in the articles exhibited against him in this suit," and had thereby disobeyed and contravened the monitions served upon him. "For which disobedience the Judge did pronounce him to have been guilty of contumacy. And for the conduct aforesaid the Judge did farther decree and declare" that he should be suspended *ab officio et beneficio* for three years:—*Held*, that this was a matter of ecclesiastical procedure alone, and was not, therefore, the subject of a proceeding in prohibition. The suspension was only a step in the proceedings which had been regularly instituted in 1874, and was in itself perfectly regular.—*Per* Lord *Blackburn*: The temporal Court, proceeding in prohibition, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters.—*Martin* v. *Mackonochie* (Law Rep. 3 P. C. 409) and *Hebbert* v. *Purchas* (Law Rep. 4 P. C. 301) approved. Mackonochie *v.* Lord Penzance - - - - 424

ESTOPPEL—Forgery—Adoption of signature
See Bill of Exchange. 1. [82

EVIDENCE—Marriage—*Ceylon* - - 364
See Ceylon, Law of. 2.

—— Marriage—Scotch marriage - - 489
See Scotch Law. 6.

—— Precognitions - - - - 489
See Scotch Law. 6.

—— Statements of deceased person - 489
See Scotch Law. 6.

FEU CHARTER - - - - 560
See Scotch Law. 3.

FOREIGN ATTACHMENT - - - 393
See Mayor's Court.

FOREIGN BILL OF EXCHANGE—Estoppel 82
See Bill of Exchange. 1.

FOREIGN CORPORATION - - 386
See Australia, Law of

FORFEITURE—Land - - - 628
See New South Wales, Law of. 2.

FORGED PATENT—Expiration of - - 176
See Patent. 2.

FUTURITY—Words of - - - 471
See Will.

GARNISHEE ORDER - - - 393
See Mayor's Court.

HABIT AND REPUTE—Scotch marriage - 489
See Scotch Law. 6.

HERITABLE PROPERTY—Privilege annexed to - - - - - 295
See Scotch Law. 8.

HOLOGRAPH AGREEMENT—Scotch law 295
See Scotch Law. 8.

HONDURAS, LAW OF—*Territorial Sovereignty—Adverse Possession against the Crown—Held*, in an information of intrusion relating to land in *British Honduras*, that the Defendants having shewn sixty years' adverse possession there from before 1817, by themselves and their predecessors in title, without disturbance or effectual claim by the Crown, such information must be dismissed. Although *British Honduras* was formally declared to be a British Colony, and formally annexed to British dominions by a proclamation of Her Majesty, dated the 12th of May, 1862, yet grants of land having been made therein by the Crown as early as 1817; *held*, overruling the opinion of the Supreme Court, that the territorial sovereignty of the Crown must be deemed to have been acquired in or before that year. Attorney-General for British Honduras *v.* Bristowe - - 143

HOSPITAL—Nuisance - - - 193
See Nuisance.

HUSBAND AND WIFE — *Necessaries — Agency—Notice not to trust.*] Where the husband neither does, nor assents to, any act to shew that he has held out his wife as his agent, to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. That question is one of fact. The management of the husband's house would raise a presumption of agency as to matters necessarily connected with that management, which might not be got rid of by a mere private arrangement between husband and wife. Otherwise where such management did not exist. *A.* was the manager of a limited company's hotel at *Bradford*—where his wife acted as manageress—they cohabited—he made his wife an allowance for clothes, but forbad her to pledge his credit for them. She purchased clothes in *London*, the bills for which were at first made out in her name and were paid by her. She afterwards incurred, with the same tradesmen, a debt for clothes, payment for which was demanded from the husband, with whom, previously, they had had no communication:—*Held* (affirming the judgment of

HUSBAND AND WIFE—*continued.*
the Court below), that the husband was not liable —that under the circumstances here the mere fact of cohabitation did not raise a presumption of agency, nor require a proof of notice not to trust his wife. Debenham *v* Mellon - - 24
—— Evidence of marriage—*Ceylon* - 364
See Ceylon, Law of. 2.
—— Evidence of marriage—Scotch law - 489
See Scotch Law. 6.

IMPRISONMENT—Perjury—Second time 229
See Criminal Law.
INCOME TAX—*New Brunswick* - - 373
See New Brunswick, Law of.
—— Scotch law - - - - 315
See Scotch Law. 4.
INDEMNITY—Trustee—Severance of trust funds
See Scotch Law. 14. [855
INDICTMENT—Two counts—Sentence - 229
See Criminal Law.
INDORSEE—Bill of exchange—Right to be indemnified by acceptor - - 1
See Bill of Exchange. 2.
INNUENDOES - - - - 156
See Slander.
INTEREST—Mortgage - - - 181
See Mortgage. 2.
INVESTMENT—Severance of trust funds - 855
See Scotch Law. 14.

JUDICIAL COMMITTEE—Effect of order - 482
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JURISDICTION—Suit against public officer 619
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JURISDICTION OF COURT OF QUEEN'S BENCH—Supreme Court of *Canada* - 644
See Canada, Law of.

LANCASTER COURT - - - - 657
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LANDLORD AND TENANT—Agreement 340
See Scotch Law. 5.
LEE NAVIGATION - - - - 685
See River.
LEX LOCI CONTRACTÛS—Foreign corporation
See Australia, Law of. [386
LIEN—Unpaid vendor—Deposit of deeds with banker - - - - 722
See Banker.
LIMITATIONS, STATUTE OF—*Ceylon* - 164
See Ceylon, Law of. 1.
LOCAL GOVERNMENT — *Scotland* — Power to make road - - - - 833
See Scotch Law. 11.

MARRIAGE—Presumption of—Law of *Ceylon*
See Ceylon, Law of. 2. [364
—— Scotch—Habit and repute - - 489
See Scotch Law. 6.
MAYOR'S COURT—*London—Foreign Attachment —Garnishee.*] The process against a garnishee, to enforce obedience to the jurisdiction of the Lord
MAYOR'S COURT—*continued.*
Mayor's Court in foreign attachment, is personal, and cannot be applied to a corporation aggregate. —Where, therefore, a corporation aggregate was cited, as garnishee, to appear in the Lord Mayor's Court, it was held entitled to maintain prohibition.—The suit of foreign attachment is founded upon ancient custom, and in itself is perfectly valid. The process by which it is sought to be enforced must be strictly pursued according to the custom. Fictitious summonses and returns will render the suit invalid.—No payment, but a payment made by compulsion of law, can discharge a garnishee from his original liability to his creditor. Mayor and Aldermen of London *v.* London Joint Stock Bank - - 393
METROPOLITAN POOR ACT—Nuisance - 193
See Nuisance.
MINE—Income tax - - - - 315
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See Criminal Law.
MISDIRECTION—*Canada* Court - - 644
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MISTAKE—Charging compound interest - 181
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MONITION - - - - - 424
See Ecclesiastical Court. 2.
MORTGAGE—*Consolidation—Redemption Suit—Parties—Trustees—Rules of Court*, 1875, *Order xvi., r.* 7.] The mortgagor of one property assigned the equity of redemption, and afterwards mortgaged another property to the mortgagee of the first. The assignee of the equity of redemption having brought an action to redeem the first property, the mortgagee claimed to consolidate the mortgages:—*Held* (affirming the decision of the Court of Appeal), that the right of the purchaser of an equity of redemption cannot be affected by a mortgage created after the purchase, and that the assignee was entitled to redeem the first mortgage without redeeming the second.—Also that under Order xvi., rule 7, trustees of an equity of redemption sufficiently represent their *cestui que trust* in a redemption suit, no direction to the contrary having been made by the Court.—*Tassel* v. *Smith* (2 De G. & J. 713; 27 L. J. (Ch.) 694) overruled.—*Beevor* v. *Luck* (Law Rep. 4 Eq. 537 commented on.—*White* v. *Hillacre* (3 Y. & C. (Ex.) 597) approved. Jennings *v.* Jordan 698
2. —— *Settled Account re-opened, Compound Interest charged by Mistake—Mutual Mistake of Law.*] In the absence of special agreement simple interest only can be charged in a mortgage account. —Where such mortgage account had been settled on the footing of compound interest with half-yearly rests, both parties wrongly understanding the mortgage deed to require the same:—*Held*, that such settled account might be re-opened.—Although under certain circumstances the giving credit in account may be treated as so far equivalent to payment under mistake of law as to prevent sums wrongly credited being recoverable at law;

MORTGAGE—*continued.*
yet in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. Daniell *v.* Sinclair - 181
—— Deposit of deeds with banker - - 722
See Banker.

NATAL, LAW OF—*Jurisdiction—Suit against Public Officer in his Official Capacity—Liability of Servants of the Crown—Petition of Right.*] In a suit against Her Majesty's Deputy Commissary-General for *Natal*, and as such representing Her Majesty's Commissariat Department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of Defendant or his employés, and for general damage:—*Held*, on exceptions by the Defendant to the jurisdiction of the Court and to the declaration, that the Defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the Commissariat Department; and that there was no cause of action against him.—The Government revenue cannot be reached by a suit against a public officer in his official capacity.—*Quære*, whether the Court would have had jurisdiction if a petition of right had been presented and the Crown had ordered that right should be done. Palmer *v.* Hutchinson - - - - - - 619

NAVIGABLE RIVER - - - 273
See Scotch Law. 10.
—— - - - - - - 685
See River.

NECESSARIES—Wife—Liability of husband 24
See Husband and Wife.

NEGLIGENCE—Damage to ship - - 217
See Ship. 2.

NEW BRUNSWICK—31 *Vict. c.* 36, *s.* 4—*Income Tax leviable on Balance of Gain over Loss.*] The tax imposed by sect. 4 of *New Brunswick* Act, 31 Vict. c. 36, upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "income," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense, as the balance of gain over loss. Lawless *v.* Sullivan - - - - - 373

NEW SOUTH WALES—*Law of—Dedication of Land to Public Purposes by the Crown—Presumption from User—Crown Lands Alienation Act*, 1861, *ss.* 3, 5—5 *& 6 Vict. c.* 36.] From long-continued user of a way by the public, whether land belongs to the Crown or to a private owner, dedication from the Crown or private owner, as the case may be, in the absence of anything to rebut the presumption may and ought to be presumed.—The same presumption from user should be made in the case of Crown lands in the colony of *New South Wales*, apart from the *Crown Lands Alienation Act*, 1861, though the nature of the user and the weight to be given to it vary in each particular case—Assuming that the effect of the 3rd and

NEW SOUTH WALES—*continued.*
5th sections of the Act is that any dedication by the Crown must since 1861 be in manner prescribed by the statute:—*Held*, that from a continuous user of twenty-one years before the statute continued since 1861 down to the time of the action without any interruption or interference on the part of the Crown, a dedication prior to the statute, and at a time when the Crown had power to dedicate, might be presumed; and that that presumption was strengthened by the subsequent user.—5 & 6 Vict. c. 36, of the Imperial Parliament leaves the power of the Crown with regard to public roads as it existed by the common law, and does not interfere with its right to dedicate lands for that purpose. Turner *v.* Walsh 636

2. —— *Law of—Lands forfeited to the Crown cannot be conditionally sold—Crown Lands Alienation Act*, 1861, *s.* 13.] Lands taken under a conditional sale and afterwards forfeited to the Crown are not open to a conditional purchase under sect. 13 of the *Crown Lands Alienation Act*, 1861. The Crown has, under the 18th section, the option either to sell them by public auction or to retain them in its own hands. Blackburn *v.* Flavelle [628

NEW TRIAL—*Canada* Court - - 644
See Canada, Law of.

NOTICE—Not to trust wife - - - 24
See Husband and Wife.

NUISANCE—*Metropolitan Poor Act—Hospitals.*] The *Metropolitan Poor Act*, 1867 (30 Vict. c. 6) authorizes the formation of districts and district asylums for the care and cure of sick and infirm poor, creates corporations for that purpose, gives authority to the Poor Law Board (now the Local Government Board) to issue directions to these corporations, enables them to purchase lands and erect buildings for the purposes of the Act, and makes the rates of parishes and unions liable for the outlay thus incurred. But it does not, by direct and imperative provisions, order these things to be done, so that if, in doing them, a nuisance is created to the injury of the health or property of persons resident in the neighbourhood of the place where the land is purchased, or the buildings erected, it does not afford to these acts a statutory protection. And therefore, where such nuisance was found as a fact:—*Held*, that the District Board could not set up the statute, nor the orders of the Poor Law Board under it, as an answer to an action, or to prevent an injunction issuing to restrain the Board from continuing the nuisance.—*Per* Lord *Blackburn*: On those who seek to establish that the Legislature intended to take away the private rights of individuals, lies the burden of shewing that such an intention appears by express words or necessary implication. —*Per* Lord *Watson*: Where the terms of a statute are not imperative, but permissive, the fair inference is that the Legislature intended that the discretion, as to the use of the genreal powers thereby conferred, should be exercised in strtct conformity with private rights. Metropolitan Asylum District *v.* Hill - 193

OFFICER—Public—Suit against - - 619
See Natal, Law of.

ONUS PROBANDI—Evidence of marriage 364
See Ceylon, Law of. 2.
—— Purchase by conservators of river - 685
See River.
OWNERSHIP—Act of - - - 164
See Ceylon, Law of. 1.

PARTIES—Redemption suit—Trustees - 698
See Mortgage. 1.

PARTNERSHIP—*Assignation by one Partner of his whole Interest to another.*] A prosperous company came to consist of three partners, *A.*, *B.*, and *C.*, having equal shares. The contract of co-partnership contained, *inter alia*, a clause that it should not be in the power of any of the partners to assign all or any part of their shares or interest in the capital, stock, or profits of the concern to any person or persons, or give them a right to inspect the company's books, or to interfere in any way with the business; and should any such assignation be granted the same was declared of no effect so far as regards the company. There was also a clause that on the retirement of a partner the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. *A.* entered into an agreement by which he sold to *B.* his whole interest. *A.'s* name remained on the books, and he signed all deeds relating to the business till his death seven years after. *C.* was not till then informed of the agreement. He then claimed to participate on the grounds of (1) an alleged mandate to *B.* to purchase for the company *A.'s* interest; (2) that the agreement could only be legally made under the contract of co-partnership with his consent; and (3) that *B.* had secretly acquired a benefit for himself within the scope of the partnership business:—*Held*, affirming the decision of the Court below, that in point of fact no agreement had been made between *B.* and *C.* to the effect that *B.* was to buy *A.'s* interest for the partnership. And in respect to the articles of co-partnership they did not prevent the agreement being made, and otherwise it was perfectly legal. Therefore *C.* was not entitled to any benefit under it. Cassels *v.* Stewart - 64

PATENT—*Prolongation of New Patent limited in its Application—Reservation of the Rights of the Crown.*] When a patent is prolonged, if the invention is likely to be used by the Government, it is usual to insert a condition, reserving the rights of the Crown. *In re* Napier's Patent 174

2. —— *Prolongation—Practice—Foreign Patents should be stated in Petition—Renewal of English Patent although Foreign Patent expired—Duty of Patentee as to Accounts.*] Where a patentee, whether English or foreign, has obtained foreign patents they should be stated to their Lordships and the fullest information afforded as to the profits thereof.—An English patent may be renewed though a foreign one has been taken out and allowed to expire.—A patentee should preserve the clearest evidence of everything which has been paid and received on account of the patent. Whether or not his remuneration has been adequate, his furnishing a satisfactory account is a condition precedent to his obtaining an extension of his term. *In re* Adair's Patent 176

PAYMENT—Commencement of—Construction of statute - - - - 114
See Scotch Law. 13.
PEERAGE—Scotch law - - - 489
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PERJURY—Sentence—Two counts - 229
See Criminal Law.
PERSONAL OBLIGATION—Conveyance of heritable property - - - 295
See Scotch Law. 8.
PETITION—Prolongation of patent - 176
See Patent. 2.
PETITION OF RIGHT—Jurisdiction - 619
See Natal, Law of.
PILOT - - - - - - 217
See Ship. 2.
PLEADING—Slander - - - 156
See Slander.

PRACTICE—*Effect of Order of the Queen in Council—Trustee's Liability for Costs.*] When a decision of the Judicial Committee has been reported to Her Majesty and has been sanctioned it becomes the decree or order of the final Court of Appeal; and it is the duty of every subordinate tribunal to whom the order is addressed to carry it into execution.—A trustee in bankruptcy can be made personally liable for costs of a suit to which he is a party, subject to the Court of Bankruptcy allowing him to recoup himself out of the bankrupt estate, if his conduct has been *bonâ fide*. Pitts *v.* La Fontaine - - - 482

—— Ecclesiastical law - - - 657
See Ecclesiastical Law. 1.
—— Patent - - - - - 176
See Patent. 2.
—— Scotch law—Amendment of record - 560
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—— Purchase by conservators of river - 685
See River.
PRINCIPAL AND AGENT—Liability of principal
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—— Wife—Liability of husband - - 24
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PRINCIPAL AND SURETY—Acceptor and indorser of bill of exchange - - 1
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PRIVILEGE—Annexed to heritable property
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PUBLIC OFFICER—Suit against - - 619
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PUBLIC RECREATION—Land for—Power to make road over - - - 833
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QUEEN'S BENCH—*Canada* - - 644
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REDEMPTION—Mortgage - - - 698
See Mortgage. 1.

RIPARIAN OWNER - - - 685
See River.

RIPARIAN OWNERS—Scotch Law - 273
See Scotch Law. 10.

RIVER — *Lee Navigation — Towing Path—Evidence of Ownership — Presumption — Onus Probandi.*] Provisions in different Acts of Parliament appointed conservators of a river navigation, and gave them full powers to do what was necessary for carrying the object of the Acts into effect, including powers to purchase land and levy tolls. The conservators executed the powers of the Acts so far as related to the improvement of the river navigation, and the making of towing-paths—and they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, and had been used to form the towing-paths:—*Held*, that, as the Acts might be carried into effect without purchasing, the burden of proof lay on the conservators to shew that they had purchased; and since they had failed to shew it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing-paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing-paths. Conservators of the River Lee Navigation *v.* Button - - - - 685

—— Clyde navigation - - - 273
See Scotch Law. 10.

ROAD—Power of magistrates to make - 833
See Scotch Law. 11.

ROADS AND BRIDGES ACT—*Scotland* - 881
See Scotch Law. 3.

ROMAN-DUTCH LAW - - 164, 364
See Ceylon, Law of. 1, 2.

RULES OF COURT, 1875, Order XVI., r. 7 698
See Mortgage. 1.

SALE OF GOODS—Prevention of condition 251
See Scotch Law. 1.

SCOTCH LAW—*Contract—Condition Precedent—Implement of Condition prevented—Remedy.*] If, in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied.—By a written contract *A.* agreed to buy of *B.* a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the *C.* railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "*C.*" cutting and tried at a face not a "properly opened-up" one, and breaking down, after a few days work, *A.* refused to give it any further trial or to pay the price of the machine:—*Held*, affirming the decision of the Court below, that *B.* was entitled to a decree against *A.* for payment of the price of the machine. Mackay *v.* Dick - - - - 251

2. —— *Contract to purchase—Article in Course of Completion—Unfinished Ship—Bankruptcy—Security—Delivery of Article before Sequestration—Mercantile Law Amendment (Scotland) Act*, 1856 (19 & 20 *Vict. c.* 60), *s.* 1.] By the law of *Scotland* there must be delivery to give effect to a contract of sale, but the *Mercantile Law Amendment (Scotland) Act* for the express purpose of assimilating the law of *Scotland* to that of *England* on such points, enacts: "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing the delivery of the same."—*B. & C.*, by verbal communing, agreed to make advances to *A.* on the security of a ship he had nearly completed building on his own account, provided *A.* entered into an absolute contract of sale of the vessel. An unqualified contract of sale was completed by which *A.* agreed to complete and deliver to *B. & C.* the vessel, for a price to be paid in two instalments, with power to *B. & C.*, in the event of *A.* failing to complete the contract, to enter into possession of the vessel and complete it, or sell it.—In a correspondence between *A.* and *B. & C.* and a shipbroker and others subsequent to the contract, and for the purpose of getting a purchaser for the vessel, the ship was called *A.'s* ship; but no letters were written to any persons who were induced by their means to deal with the ship upon the footing of its being the property of *A.*—From the date of the contract *B. & C.* gave, by cheques at various dates, advances to *A.*, taking a receipt on account of the purchase of the ship; at the same time bills for like amounts were accepted by *A.* The advances equalled the full price of the ship. Before it was completed or delivered *A.'s* estate was sequestrated. The bills accepted by *A.* were paid by *B. & C.* In a question between *A.'s* trustee and *B. & C.*:—*Held*, (1) affirming the decision of the Court below, that there was here a *bonâ fide* sale in fact and intent unaccompanied by delivery, and —whether security was the object or not—every condition of the statute was fulfilled; (2) that no reputation of ownership had been created in the seller *A.* Therefore *B. & C.* had a right to the ship.—*Held*, where there is an absolute *bonâ fide* contract of sale of an article, which is not delivered before the bankruptcy of the seller, the right of

SCOTCH LAW—*continued.*
the buyer under the contract to have delivery cannot be defeated by proof that the character of buyer had been conferred on him merely for the purpose of his having a security for money intended to be advanced by him. M'Bain *v.* Wallace & Co. - - - - 588

3. —— *Charter—Similar restrictive Conditions appearing in Feu Charters from Common Superior—What necessary to give each Feuar a Title to enforce them—Suing with another Person's Consent and Concurrence—Strangers to the Action—Practice—Amendment of the Record*—31 & 32 *Vict. c.* 100, *s.* 29.] It is settled by a series of decisions in the law of *Scotland* that where it appears that the restrictions in a feu contract are entered into for the benefit of other feus, either already existing, or to be created by the superior thereafter, the restrictions may be enforced by each co-feuar as far as his interest is concerned. But the fact of several feuars of neighbouring plots of building land in the same street, holding from a common superior does not, by itself, entitle one of those feuars to claim the benefit of restrictions contained in the feu contract of another, unless some mutuality and community of rights and obligations is otherwise established between them, which can only be done by express stipulations in their respective contracts with the superior, or by reasonable implication from reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves.—*A.'s* author was a party to a feu contract of a piece of land upon which a house was already built, and he was taken bound not to build any other buildings on the said piece of land except offices. The adjoining pieces of land were feued off, some being taken not to build and others having that right. It was not indicated in *A.'s* feu that the restrictions were imposed for the benefit of the co-feuars, beyond the facts that the feus were all given out nearly at the same time; that some of the conditions inserted in the feus are similar to each other; and that the houses being built in a square, produce a considerable degree of uniformity.—*B.* and *C.*, proprietors of a neighbouring feu, sought to prevent *A.* building a carriage show room on the ground intervening between his house and the street of the square, and raised an interdict with the "consent and concurrence" of the superior; there was no condescendence or pleas in law for the superior:—*Held*, reversing the decision of the Court below (1), that the restrictive conditions as to building in *A.'s* feu contract was not in any sense *jus quæsitum tertio;* and (2), that the superior was not a party complainant in the action for his own separate interest; and therefore *B.* and *C.* being strangers to *A.'s* contract, *A.* ought to have been assoilzied from the action.—Persons who have no title in their own persons to raise and insist in an action, cannot have the right to sue, where nil, validated by the consent and concurrence of the party to whom alone such right or title of action belong. —*B.* and *C.*, owners of an adjoining feu, raised an action with "consent and concurrence" of the common superior to enforce building restrictions contained in *A.'s* feu contract:—*Held*, that *B.* and *C.* were strangers to the action, and therefore had no title to sue.—See remarks of Lord *Watson* as to the question of the importation of new parties into the suit under the *Court of Sessions Act*, 1865 (31 & 32 Vict. c. 100). Hislop *v.* Leckie [560

4. —— *Income Tax—Coal Mines — Exhaustion of Pits—Deductions from Gross Profits—Statutes* 5 & 6 *Vict. c.* 35, *ss.* 100 (*Rule* 3), *and* 159; 29 *Vict. c.* 36, *s.* 8.] A tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled, in computing the profits for assessment of income tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores and sinking pits, which have been exhausted by the year's working.—See Lord *Penzance's* opinion as to the method of taxation intended by the Legislature to be applicable to mines.—*Knowles* v. *McAdam* (3 Ex. D. 23) held wrongly decided. Coltness Iron Company *v.* Black - - - 315

5. —— *Landlord and Tenant — Agreement, Construction of—Holograph Writing—Agreement between Tenant and Landlord, written from the latter's Dictation.*] Tenants of quarries situated about three miles from their works, who were accustomed to convey the stones from the quarries to the works by carts, entered into an agreement with their landlord to construct a tramway from the quarry to the works, to run, *inter alia*, "by the end of the policy" of the landlord: and they further agreed to compensate the farm tenants along the line for any damage done to their farms during the currency of their leases. The landlord agreed, *inter alia*, to give gratuitously the land required for the tramway. Outside the policy ground there was a private road the property of the landlord, which, before it reached the tenant's works, ran through another tenant's stone pavement yard. This was the only practical route outside the policy for the tramway; and it was alleged that the only obstacle to laying it along that road was that the other tenant might refuse to allow it being laid on that part passing through his yard, but for this there were no *termini habiles*. —The tenants claimed that the landlord was bound to give them the use and possession of land for the purpose of the tramway, and that, either (1) "within and by the end of the policy," or (2) "in any other place as suitable and convenient for them in every respect":—*Held*, reversing the decision of the Court below, that under the agreement the stipulation was that the tramway should pass outside the walls which enclose the policy of the landlord; and that by agreeing to give gratuitously the lands required, the landlord merely undertook to give the tenants such rights as were vested in him, leaving them (with the power to use his name) to settle with any persons who might have a right or interest entitling them to object to the formation of the tramway.—A landlord entered into an agreement with a tenant, the terms of which were dictated by the landlord to a person who acted as his factor. The agreement was then handed unsigned to the tenant, who was present. The factor's name did not appear in the agreement, nor had he any authority to make the agreement for the

SCOTCH LAW—*continued.*

landlord. Subsequently the tenant resiled from the agreement:—*Held*, affirming the decision of the Court below, that the writing was not a valid holograph writ, and therefore the tenant could resile from it.—Lord *Watson* doubted whether the document would be valid even if the factor had been the sole negotiator acting in the landlord's absence and by his instructions. Sinclair *v.* Caithness Flagstone Quarrying Co. - 340

6. —— *Marriage—Habit and Repute—Mutual Consent de præsenti before Witnesses—Evidence—Admissibility of Statement not on Oath of deceased Person—Statements post litem motam — Statutes* 15 *&* 16 *Vict. c.* 27; 16 *&* 17 *Vict. c.* 20; *and* 37 *&* 38 *Vict. c.* 64*—Precognitions—Admissibility of.*] The law of *Scotland* accepts the continued cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of *Scotland*.—Cohabitation outside *Scotland* will not constitute marriage, although it may be competently founded on, either as corroborative evidence of a ceremony in *Scotland*, or as evidence that a ceremony proved to have taken place in *Scotland* was truly intended by the parties as a present interchange of matrimonial consent.—*A.* alleged that she was lawfully married to *B.* by interchange of mutual consent *de præsenti* before witnesses in 1844 in *Scotland*, and that having remained in *Scotland* for about a month, *B.* and she cohabited at divers places in *England* as husband and wife, and that a son now living was born of the marriage in 1863.—Between 1844 and 1849, when *B.* deserted *A.*, three daughters were born, one of whom *B.* registered as legitimate. In 1851 *B.* married *C.* at a parish church in *England* and had children. *A.* was informed of this marriage shortly after its celebration, but took no steps to have the validity of the averred irregular Scotch marriage of 1844, or the nullity of the marriage of 1851, judicially declared, until 1880. The alleged witnesses to *A.'s* marriage were admitted now to be dead, but they were alive in 1853, when they might have been judicially examined in an action brought against *B.* for the board and lodging of *A.*:—*Held*, that the evidence completely disproved the allegation of a marriage between *A.* and *B.*—*B.* married *C. in facie ecclesiæ* in 1851, had issue, and died in 1872. In an attempt by *A.* to set up a previous irregular Scotch marriage, a witness gave evidence that *B.* told him repeatedly after 1851 that *A.* was his wife and not *C.*:—*Held*, that such evidence was not admissible.—Effect of the statute 37 & 38 Vict. c. 64 (1874) *held* not necessary to decide.—In an attempt on the part of *A.* to set up an irregular marriage according to the law of *Scotland* between herself and *B.*, statements prepared by *D.*, the Plaintiff, in an action against *B.* as the alleged husband of *A.* for *A.'s* board and lodgings; which statement was signed—and in one case corrected by interlineations—by deceased persons who, if alive, would have been competent witnesses, were sought to be used as evidence:—*Held*, that they were not admissible. Dysart Peerage Case - - - - - - 489

SCOTCH LAW—*continued.*

7. —— *Peerage.*] *Held*, that *William John Manners* had made out, and established, his right to the dignities of Earl of *Dysart* and Lord *Huntingtower* in the peerage of *Scotland*. Dysart Peerage Case - - - - - 489

8. —— *Personal and Real Property — Privileges stipulated for in Conveyance of Heritable Subjects—Jus quæsitum tertio — Theatre.*] Trustees acting for the shareholders or rentallers of a theatre, called the *Queen's Theatre and Opera House*, who had obtained a feu right to the site, granted in 1858 a disposition of the ground and buildings to one *J. B.*, subject, *inter alia*, to the real burden of a perpetual annuity of £2 per share to each rentaller of the said *Queen's Theatre and Opera House*, and to the successors or assignees of them; and it was further declared that each of the said rentallers, or the assignee or successors of such, should at all time be entitled, *inter alia*, to free admission to the auditorium of the said *Queen's Theatre and Opera House*; also declaring that *J. B.* should not convert the said theatre to any other use; and that he should keep it open for performance six months in each year. There was no stipulation as to insurance of the theatre or as to the rebuilding of it in case of destruction by fire or otherwise.—In 1865 the theatre was entirely destroyed by fire, and was rebuilt by *J. B.'s* trustee and called by another name.—In 1875 it was again entirely burnt down, and again rebuilt.—From 1865 to 1879 the theatre, under the new name, was twice sold, but in each case the conveyance was granted subject to the "real burdens, conditions, provisions, declarations and others," specified in the original disposition of 1858, and especially under the burden of payment of the annuities to the rentallers, and of allowing "these parties the privileges to which they are entitled." The privilege of free admission was enjoyed by the rentallers for fourteen years after the destruction of the first theatre. But in 1879 disputes arose as to the validity of the rentallers' right to, *inter alia*, the privilege of free admission. The trustees maintained that the rentallers were entitled under the disposition of 1858 and the succeeding conveyances to the same privileges in the new theatre which they had in the first:—*Held*, affirming the decision of the Court below, that the privileges conferred on the rentallers by the original dispositions—other than the payment of the annuities, which was constituted a real burden—rested only on the personal obligation of the original disponee, and were confined to the theatre then in existence; and that the subsequent deeds, to which the rentallers were not parties, were not intended to, and did not, confer on them any new right. Scott *v.* Howard - - - 295

9. —— *Practice—Judicature Act of Scotland*, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40*—Process—Appeal—Cases commenced in Sheriff's Court—Matters of Fact found by the Court of Session—Remit to Court below—Proof.*] The 40th section of the *Judicature Act* of *Scotland*, 1825, enacts, *inter alia*, that the judgment in cases commenced in the Sheriff's Court shall be subject to appeal to the House of Lords only so far as the same depends on, or is affected by, matters of law; but shall, in so far as relates to the facts, be held to have the force and

SCOTCH LAW—*continued.*

effect of a special verdict of the jury, finally and conclusively fixing the several facts specified in the interlocutor.—In appeals falling within the scope of this section, the House of Lords has no concern with the proof which has been led in the Sheriff's Court. When it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shewn by a reference to the record, and not to the proof. And if the questions are not raised by the record, no remit will be made. MACKAY *v.* DICK - 251

10. —— *River—Navigable River—Right of the Clyde Trustees to dredge Foreshore, the Property of the Riparian Proprietor — Clyde Navigation Consolidation Act* (21 & 22 *Vict. c.* 149), *ss.* 76, 84.] The *Clyde* Navigation Trustees, being empowered by sects. 76 and 84 of 21 & 22 Vict. c. 149, to dredge the bed of the River *Clyde* to a depth of seventeen feet, cannot be interdicted from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their Acts of Parliament.—*Held* so, affirming the decision of the Court below, but without prejudice to the question of their liability to subsequent compensation for damage. LORD BLANTYRE *v.* CLYDE NAVIGATION TRUSTEES - - - 273

11. —— *Roads—Power of Magistrates in the exercise of Administration to make Road over Land held for Public Recreation—Constitution of new Rights and Burdens—Alienation of Solum—Costs—Alteration of Interlocutor.*] Magistrates for a burgh held the links from time immemorial for behoof of the inhabitants, and, *inter alia*, subject to the obligation of preserving the same for the purposes of the game of golf, and for the recreation and amusement of the inhabitants. They had from time to time exercised powers of administration and management over the links, such as the letting of the pasturage, the regulation of bleaching clothes on the links, the construction of a sloping walk, and the levelling and filling up other portions of the ground. The magistrates proposed to make a macadamised road along the outside boundary of the links, where that boundary adjoins certain feus let off by them in 1820, which feus are no longer, in point of law, part of the links.—*P.*, an inhabitant of the burgh and member of the principal golfing club there, and others, the Appellants, sought by note of suspension and interdict to restrain the magistrates either from making the road or from permitting any road to be used in that place for wheel traffic:—*Held*, substantially affirming the decision of the Judges of the Court below, but altering their interlocutor, that the evidence proved that the proposed road would have no substantial interference with the obligation of golfing, &c., and that the road might be reconciled with its due observance; but that it was inconsistent with that obligation for the magistrates to alienate any part of the *solum* of the ground in question, or to abdicate their existing powers of administration either by granting private easements to

SCOTCH LAW—*continued.*

particular individuals, or, having made the road, to create a public easement by dedicating it to the public.—*Held*, also, that the Respondents were not entitled to their costs in the appeal on the grounds that the alteration made in the interlocutor of the Court below was wanted to give complete security to the interests represented by the Appellants; and because the attitude of both sets of Respondents before action brought was such as to justify the institution of some action for the purpose of obtaining the declarations now obtained. PATERSON *v.* PROVOST, &c., OF ST. ANDREWS - - - - - - 833

12. —— *Roads and Bridges (Scotland) Act*, 1878 (41 & 42 *Vict. c.* 51), *ss.* 4, 5, 6, 7, *and* 37—*Construction of.*] The trustees of the *W. S.* bridge, which spans the River *Dee* and connects the counties of *Kincardine* and *Aberdeen*, sought to have it found that the local Acts 10 Geo. 4, c. 43, and 23 Vict. c. 26, being the *W. S. Bridge* and Road Acts—had ceased to be of force and effect within the county of *Kincardine* (that county having adopted the *Roads and Bridges Act*, 1878): That the trustees have ceased to be under any obligation as regards the management or maintenance of the bridge or road, and that the Defenders, the county road trustees of *Kincardine*, and the commissioners of supply of the county of *Aberdeen*, are bound to maintain and keep in proper repair the bridge and road: and further, that the trustees have ceased to be liable for the debts incurred by them as trustees. By the local Act of 1865 tolls were abolished in the county of *Aberdeen*; but from its provisions the burgh was excluded. The *Aberdeenshire* portion of the road and part of the bridge are within the burgh boundary.—The county of *Aberdeen* has not adopted the Act of 1878, and the commissioners of supply of that county deny any liability in respect to the maintenance, &c., of the bridge and road.—*Held*, reversing the interlocutors of the Court below, that the true effect of the *Roads and Bridges Act*, 1878, in the circumstances, was to continue in force the local Acts so far as the powers and duties thereby imposed on the trustees for the management, &c., of that part of the bridge and road which is within the county and parliamentary burgh of *Aberdeen*, together with the powers of demanding and taking tolls within the county and burgh conferred by such Acts so long as the *Roads and Bridges Act*, 1878, shall not be in force therein: that the liability of the trustees to the debts incurred under the local Acts had now ceased and fallen severally upon the Defenders: that the commissioners of supply are entitled to receive from the *W. S.* bridge and road trustees all surplus of income accruing to them from tolls exacted on the bridge and road within the county and parliamentary burgh of *Aberdeen*, after providing for the expenses of management, &c., and on doing so, are entitled to be relieved by them from the proportion of the debts belonging under the *Roads and Bridges Act*, 1878, to the county and parliamentary burgh of *Aberdeen*; and that as regards that part of the bridge and roads within the county of *Kincardine*, the local Acts had ceased to be in force; and the road trustees of that county are bound to maintain and keep in repair that part of the bridge and

SCOTCH LAW—*continued.*
road. Commissioners of Supply of County of Aberdeen *v.* Morice - - - - 881

13. —— *Statute* 42 *&* 43 *Vict. c.* 155, *ss.* 3, 6, *(Local)*—*Construction—Railway—Commencement of Payment.*] The *Caledonian Railway Company* for thirteen years up to July, 1879, had been proprietors of the *D. and A. Railway*, and had incurred certain liabilities in respect to payment of dividends to preference and ordinary shareholders of the *D. and A.* line. The preamble of the *North British Railway* (*D. and A. Joint Line*) passed July, 1879 (42 & 43 Vict. c. clv.), set forth that it was expedient that the *Caledonian* and *North British Companies* should have equal rights and powers, and be subject to equal liabilities over and with respect to the *D. and A.* line. Sect. 3 provided that on and after the 1st of February, 1880, called the "vesting period,' all interest which the *Caledonian* possessed should be transferred to the *Caledonian* and *North British* jointly and in equal proportions in manner hereinafter provided by the Act. Sect. 6 provided that the consideration for the transfer of the joint line shall be as follows: "(1.) From and after the vesting period the company (the *North British*) shall pay to the *Caledonian Railway Company* half-yearly on the 1st of March and 1st of September in each year a sum equal to one-half of the aggregate of the following half-yearly payments for which the *Caledonian Railway Company* are now liable in respect of their acquisition of the *D. and A. Railway.*"—The *Caledonian Railway Company* claimed that under this section there was a half-yearly payment amounting to £5903 15*s.* due on the 1st of March, 1880:—*Held*, affirming the decision of the Court below, that the liability to make payment in 1880 did not arise till September, the time of payment applicable to the first six months following the 1st of February, 1880.—*Per* Lord *Selborne*, L.C.: The more literal construction of a section of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. Caledonian Railway Company *v.* North British Railway Company - 114

14. —— *Trust—Legacies—Severance of Funds for Investment for Behoof of Distinct Parties—Indemnity of Trustees for Liability incurred.*] A testatrix directed her trustees to pay the interest or annual rent of £2000 to Mrs. *A.* during her life and after her death to divide that sum among her children; and to pay the interest or annual rent of a similar amount to Mrs. *B.* in life-rent, with the fee to her children.—The trustees were empowered by the deed to realize, or to continue to "hold any or all of such shares or stocks" as might belong to the testatrix at her decease, should they consider it advisable or expedient to do so without any personal responsibility for loss, if any, thereby sustained;" with power also "to lend or place out on such securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively, the securities to be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise."—The testatrix at her

SCOTCH LAW—*continued.*
death held £850 stock of an unlimited bank. The trustees, at the desire of Mrs. *A.* and without consulting Mrs. *B.*, set £200 of this stock aside as part of the fund appropriated to Mrs. *A.*, and realized the remainder. They afterwards, on the narrative of the purposes of the trust deed, and of the sums invested for the two specific legacies of £2000, and that they had paid the residue, received their discharge from Mrs. *A.* and Mrs. *B.* Statements and separate accounts of interest on the investments allocated to each were sent half-yearly to Mrs. *A.* and Mrs. *B.* All the investments stood in the names of the testatrix's trustees.—The bank became insolvent, and calls were made upon the trustees in respect of the £200 stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. Mrs. *B.* objected to any portion of her legacy being taken:—*Held*, reversing the decision of the Court below, that the trustees had the power to sever and had severed the two legacies, and had placed them in separate investments for behoof of the respective beneficiaries, and therefore the trustees had no right to relief from the investments allotted to Mrs. *B.* and her family for liabilities incurred on those allotted to Mrs. *A.* and her family.—*Ex parte Garland* (10 Ves. Jun. 110) followed. Fraser *v.* Murdoch - - 855

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SHIP—*Charterer's Duties—Docks—Delay in discharging—Demurrage.*] A charterparty for a ship to sail to "*London Surrey Commercial Docks*" is not satisfied by the ship arriving at the gate of the docks but not entering into the docks. There is no established custom in the port of *London* by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to enter into the docks. The charterparty was to "*London Surrey Commercial Docks*, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material. The charterer would not name any other docks to which the ship might be taken. The ship's master therefore took it to the *Deptford Buoys* (the nearest place to the *Surrey Commercial Docks* where it could lie in safety afloat) and there discharged the cargo by lighters

SHIP—*continued.*

carrying the timber into the *Surrey Commercial Docks*, where it was afterwards sorted and put in order on the wharf:—*Held*, that under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading. The contract in the charterparty as to demurrage was this: The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days demurrage over and above the said laying days" [there were no laying days mentioned in the charterparty] "at £30 per day payable day by day, it being agreed that for the payment of all freight, dead freight, and demurrage, the owner shall have absolute charge and lien on the said cargo . . ." "The cargo to be brought to and taken from alongside the ship at merchants' risk and expense." The ship did not fulfil the engagement in the charterparty to proceed to the *Surrey Commercial Docks* by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner was not bound to wait for an unreasonable period, until the dock authorities should be able to assign the ship a discharging berth in the docks. When that difficulty arose about the ship being admitted into the *Surrey Commercial Docks*, and the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage, and delivery charges:—*Held*, that he was warranted in so doing. Dahl *v.* Nelson - 38

2. —— *Sea Damage—Compulsory Pilotage—Steam-tug.*] Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is, at the same time, in tow of a steam-tug, the latter is bound to obey the orders of the pilot. In case of a mischief occurring to the vessel, occasioned directly by the conduct of the steam-tug, the tug (which had not noticed the pilot's signal), cannot in an action brought by the owners of the vessel for damage, set up, as a legal defence, contributory negligence, upon the grouud that if the pilot, when the mischief was about to happen, had himself done a certain thing, the mischief might possibly have been avoided.—*Bland* v. *Ross* (*The Julia*) (Lush. 231; 14 Moo. P. C. 210) commented on, and approved. Spaight *v.* Tedcastle - - - - - 217

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SLANDER—*Pleading—Action for Slander—Innuendoes—Prefatory Averment.*] Words merely conveying suspicion will not sustain an action for slander.—Where such words admit fairly, and in their natural sense, of two meanings, the one being an imputation of suspicion only, the other of guilt, the sense in which they were uttered should be

SLANDER—*continued.*

left to the jury.—The innuendoes not declaring that the words were spoken with the intention of imputing to the Plaintiff a felony, and not importing to enlarge the meaning of those words:—*Held*, that the prefatory averments which only professed to give the motives of the defendant could not be substituted for those innuendoes whereby the Plaintiff undertook to give the meaning of the words spoken. Simmons *v.* Mitchell [156

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2 Geo. 2, c. 25—*Criminal Law* - - 229
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6 Geo. 4, c. 120, s. 40—*Scotland* - - 251
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2 & 3 Will. 4, c. 93, s. 1—*Contempts in Ecclesiastical Courts* - - - 657
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SUPPORT—*Easement—Support of House by adjoining Soil—Prescription—Prescription Act*, 2 & 3 *Will.* 4, c. 71, s. 2—*Principal and Agent or Contractor—Liability of Principal for Acts of Contractor.*] A right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment and so open that it must be known that some support is being enjoyed by the building.—*Semble, per* Lord *Selborne*, L.C.: Such a right of support is an easement within the meaning of the *Prescription Act*, 2 & 3 Will. 4, c. 71, s. 2. Two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the Plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment. More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the Plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory:—*Held*, that the Plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury.—*Bower* v. *Peate* (1 Q. B. D. 321) approved. Dalton *v.* Angus - - 740

2. —— *Mines—Injury to the Surface of the Land.*] A clause in a mining lease that the lessee may work the mines "in the usual and most approved way in which the same is performed in other works of the like kind in the county," refers simply to the mode of carrying on the underground works for mining purposes; but does not suppose a custom to work the mines so as to injure or interfere with the rights of other people. Nor did the words that the mining lessee should have liberty to enter upon the land and carry away the minerals, and to erect buildings, and "do and execute all such other acts, works, and things upon, in, or under, or above, the said premises, as shall be necessary or convenient for working and carrying away the same," making compensation, &c., enlarge the power so as to deal with the mines as to let down the surface.—*Per* Lord *Blackburn*:

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—In common right the person who owns the surface has a right to have it properly supported below by minerals. A Court of Law has to look at the documents to see whether the parties have agreed upon something different from the common right. Davis *v.* Treharne - - - 460
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WILL—*Proviso*—"*Shall be born in my lifetime*" *construed as Words of futurity.*] The testator devised an estate to his six grandsons (of whom the Appellant was one) "during their respective lives, in equal shares as tenants in common, and as to the respective shares therein of each of them, my said grandsons, after his decease, to the use of his first and every other son successively, according to seniority of birth in tail male, and on failure of the issue male of any one or more of my said grandsons, then and so often as the same shall happen, I give and devise as well the share or respective shares originally limited to the grandson whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in him or them, or his or their issue male, to the use of the other or others of my said grandsons during his or their life, or respective lives, as tenants in common. And after the decease of such last-mentioned grandsons, then I give and devise the share or shares lastly hereinbefore limited to him, to his first and every other son successively according to seniority of birth in tail male; and if there shall be a failure of such issue of all my said grandsons but one of them, I give and devise the entirety of all the said estates to the use of such only grandson for his life, and after his decease to the use of his and and every other son successively accord-

WILL—*continued.*
ing to their seniorities in tail male." By a proviso at the end of the will the testator directed—"Provided always, that if any person whom I have made tenant in tail male of my said estate shall be born in my lifetime, then and in such case I revoke the devise so made to him. In lieu thereof I give and devise the hereditaments comprised in such devise and appointment to the use of the same person respectively for the term of his or her natural life, and after his or her decease, to the use of his or her first and every other son successively according to their respective seniorities in tail male." Two out of the six grandsons died without issue. The eldest son of the Appellant was born before the date of the will, and by a disentailing deed executed after the testator's death conveyed to the Appellant his share and interest in the said estate in fee. In a suit for declaration of title and consequent relief:—*Held*, that the Appellant was entitled to an estate in fee simple in one fourth part of the hereditaments and premises, the subject of the suit. The words of the proviso must be construed in their grammatical sense, and be taken to mean a tenant in tail male born after the date of the will, and therefore not to include the eldest son of the Appellant. The words "shall be born in my lifetime," in the absence of any context to explain them, are to be taken as words of futurity. Consequently the gift of an estate tail to the Appellant's eldest son, who was born before the date of the will, was not revoked. Gibbons *v.* Gibbons - - 471

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